

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

020

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD.

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 8 1968

Nathan J. Paulsen
CLERK

VOLUME I



JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

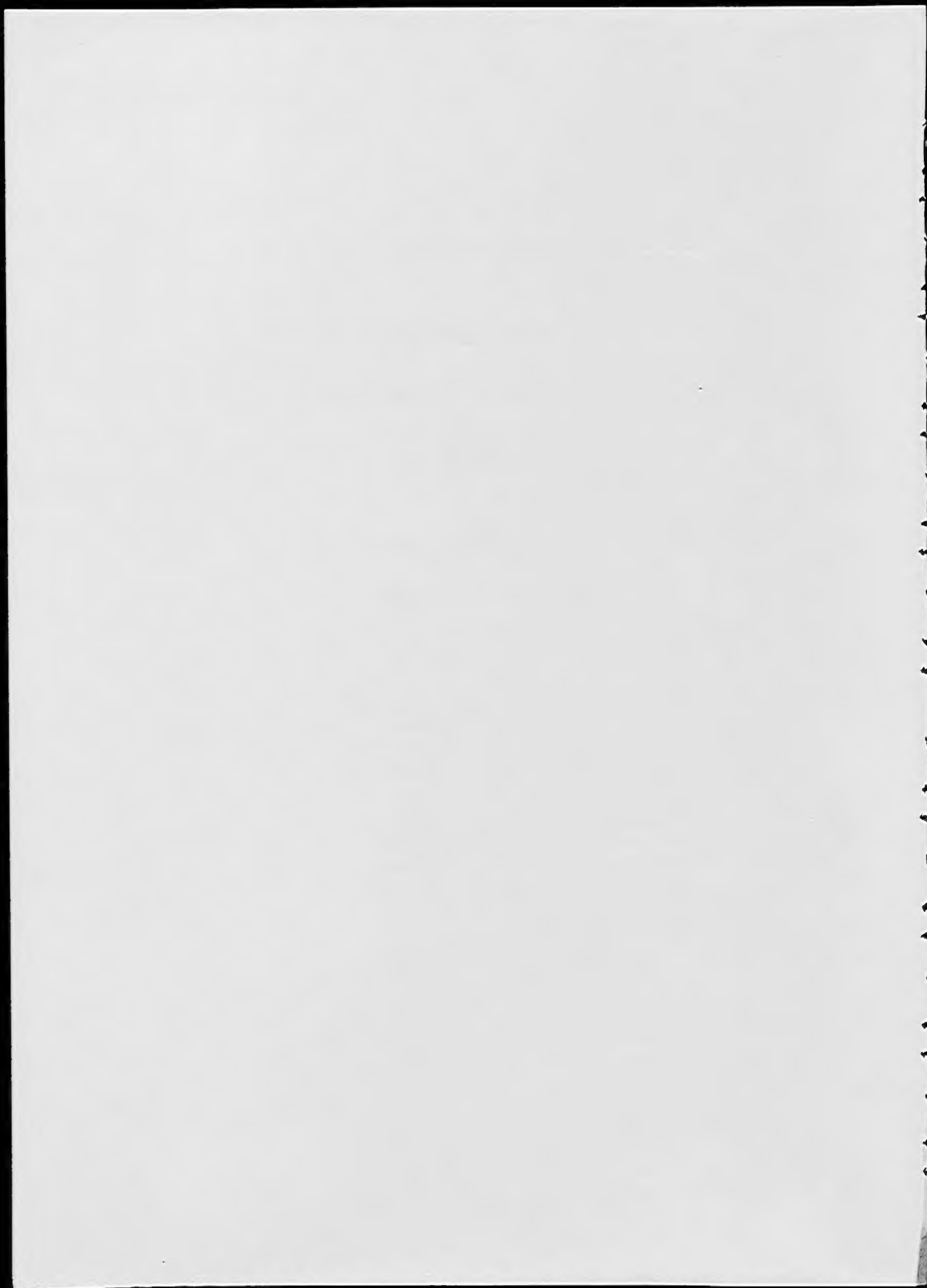
CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD.

VOLUME I



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAPITOL INTERNATIONAL AIRWAYS, INC. :

Petitioner, :

v. :

No. 21062

CIVIL AERONAUTICS BOARD, :

Respondent. :

PREHEARING CONFERENCE STIPULATION

Subject to the Court's approval, the parties hereby stipulate and agree as follows with respect to the issues and the procedures for the filing of the briefs and the joint appendix herein:

I

Issues

Following evidentiary hearings, a Civil Aeronautics board examiner found that in connection with a transatlantic charter which petitioner had contracted to operate, money paid by the chartering organization to a travel agent who did not pay petitioner the remainder of the full charter price should be treated as payments to petitioner, and that by reason of petitioner's subsequent collection of the deficit directly from the chartering participants, petitioner had collected a greater compensation for air transportation than the fares specified in its tariffs in violation of Section 403(b) of the Federal Aviation Act. He also found that petitioner had violated various sections of the Board's transatlantic charter regulations relating to documentation. The examiner issued an order directing petitioner to cease and desist from violating the sections of the statute and regulations involved. The Board denied petitioner's petition for

discretionary review, as a result of which the examiner's order became effective as the order of the Board.

The issues are:

1. Whether the refusal by the Board to review the Initial Decision was legally arbitrary and capricious, an abuse of discretion, or in violation of the standards adopted by the Board in Section 302.28(a)(2) of its Procedural Regulations [14 C.F.R. 302.28(a)(2)].
2. Whether the conclusion that petitioner had violated the Act and regulations is based upon legally sufficient findings and whether such findings are supported by substantial evidence.
3. Whether payments by the chartering organization to a travel agent in circumstances here involved were properly treated as payments to petitioner.
4. Whether the imposition of the cease and desist order under the circumstances involved was within the power and jurisdiction of the Board, consistent with the constitutional and statutory rights, powers, privileges and immunity of petitioner, an abuse of discretion, legally arbitrary and capricious, or consistent with due process.
5. Whether the cease and desist order is invalid by reason of the scope and breadth of its terms and whether this issue is open for review by the Court.

II

Procedures with Respect to Printing of the Joint Appendix, and Use of Unprinted Portions of the Record

The joint appendix shall contain the materials required to be printed by the Rules of the Court, the materials designated by the parties as hereinafter provided, this stipulation, and the order of the Court approving

the stipulation. At the time each party serves its brief, it shall also serve its designation of the portions of the certified transcript of record to be reproduced in the joint appendix. As soon as all such designations have been made, the petitioner, subject to Rule 16(a), shall cause the joint appendix to be printed, and shall file it within 10 days after the due date for the reply brief. Board counsel may release the certified transcript of record to any printer in the District of Columbia selected by petitioner to print the joint appendix.

All briefs shall cite the record by referring to page numbers in the certified transcript of record in the Form ("Tr. ____"). In the joint appendix, the record page number shall appear at the place where the material from each new record page begins, and a running head showing the record page with which each left-hand joint appendix page begins, or the right-hand joint appendix page ends, shall appear at the outer top corner of such page. (The usual consecutive numbering of joint appendix pages shall appear at the top center of each such page.)

Any party, in brief or on oral argument, may refer to and rely upon any portion of the original transcript of record herein which has not been reproduced, to the extent that such portion may be material to the stipulated issues. Any such portions of the record thus referred to will be reproduced in a supplemental joint appendix if the Court so requires.

/s/ Theodore I. Seamon

THEODORE I. SEAMON
Attorney for Petitioner

/s/ Warren L. Sharfman

WARREN L. SHARFMAN
Associate General Counsel
Litigation and Legislation
Civil Aeronautics Board
Attorney for Respondent

Dated: July 20, 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

September Term, 1966

Capitol International Airways, Inc.,

Petitioner,

v.

Civil Aeronautics Board,

Respondent.

Before: Bazelon, Chief Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

[Tr. 1]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

RECEIVED
DOCKET SECTION
JUL 30 2:19 PM '65
CIVIL AERONAUTICS
BOARD

CAPITOL AIRWAYS, INC. :
: Respondent, : Docket 16370
: Enforcement Proceeding :

PETITION FOR ENFORCEMENT

In the opinion of the undersigned, Director of the Bureau of Enforcement, there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, and the requirements thereunder have been and are being violated by the above-named respondent as alleged in the attached Complaint, verified by Eric J. Byrne, an Enforcement Attorney of the Board, and that formal investigation by the Board of the alleged violations is in the public interest.

Therefore, this Petition for Enforcement is docketed under the provisions of Rule 206 of the Rules of Practice in Economic Proceedings, and an enforcement proceeding thereby is instituted, so that the Board may determine whether any violations have been or are being committed as alleged in said complaint, and whether the relief requested therein should be granted.

Answer to the complaint is required by Rule 207 to be filed within fifteen (15) days after date of service of this petition.

/s/ Robert Burstein

Robert Burstein, Director
Bureau of Enforcement

Docketed: July 30, 1965

[Tr. 2]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

-----	:	
CAPITOL AIRWAYS, INC.	:	
	:	
Respondent,	:	Docket
	:	
Enforcement Proceeding	:	
-----	:	

COMPLAINT

The undersigned Enforcement Attorney makes this complaint against Capitol Airways, Inc. (Capitol), pursuant to the provisions of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (Board) and, on information and belief, based upon informal investigation by members of the staff of the Board, alleges the following:

1. Capitol was at all times mentioned herein, and now is, a corporation duly organized and existing under the laws of the State of Tennessee, with its principal offices located at Berry Field, Nashville, Tennessee.
2. Capitol was at all times mentioned herein, and now is, a supplemental air carrier authorized by the Board to perform charter trips in air transportation.
3. Nelson Group Travel Corporation (Nelson) is a corporation which was duly organized under the laws of the State of New York in May 1965. At the times mentioned herein prior to May 1965, Nelson was an individual proprietorship doing business under the name "Nelson Travel Service." At all times mentioned herein, the offices of Nelson were located at 81 Centre Avenue, New Rochelle, New York.

[Tr. 3]

4. Michael A. Friedman (Friedman) has been President and majority stockholder of Nelson since its incorporation. Prior to that time, Friedman was President and sole proprietor of Nelson.

5. On November 6, 1964, Capitol executed an aircraft charter agreement with the New York State Teachers Study Group (NYSTSG) for the operation of a charter from New York to Rome (via Paris) on July 1, 1965, with return from Paris on September 3, 1965.

6. On November 6, 1964, Capitol executed a charter agency agreement with Nelson, thereby appointing Nelson agent to solicit and develop aircraft charter traffic for the NYSTSG charter. Friedman signed the agreement on behalf of Nelson, and Nelson, as agent, was to receive a 5% commission of the base tariff charges from Capitol for soliciting and developing the traffic carried.

7. The chartering organization collected from individual charter participants monies covering the entire cost of the charter trip, as set forth in Capitol's currently effective tariff. The total charter price was \$52,331.00. The funds collected were transmitted by the chartering organization either directly to Capitol, or to Nelson (Friedman) for transmittal to Capitol. Nelson (Friedman) received these funds from the chartering organization with the knowledge and consent of Capitol, and in the capacity of agent for Capitol.

8. Part of the funds received by Nelson (Friedman), as agent for Capitol, from the chartering organization, namely, \$16,864.80, was not transmitted by him to Capitol prior to the operation of the flight, and has not been transmitted to date.

[Tr. 4]

9. Although the chartering organization had by May 1, 1965, transmitted to Capitol or its agent, Nelson (Friedman), an amount covering the full cost of the charter, as set forth in Capitol's currently effective tariff, Capitol, prior to operation of the charter, collected an additional \$92.50 from each charter participant, to cover the amount which Nelson (Friedman) had received from the chartering organization and had not transmitted to Capitol.

10. On July 1, 1965, Capitol operated the NYSTSG charter.

11. Capitol did not obtain prior to flight either Section A or Section B of Part II of the Statement of Supporting Information, as required by section 295.12 of the Board's Economic Regulations, or Capitol did not retain these documents, as required by section 249.10 of the Economic Regulations.

12. The chartering organization did not submit, prior to flight, a certified passenger manifest, as required by section 295.35 of the Board's Economic Regulations, or Capitol did not retain this manifest as required by section 249.10 of the Economic Regulations.

13. By reason of the acts described in paragraph 9, Capitol charged, demanded, collected, and received a greater compensation for air transportation than the rates, fares, and charges specified in its currently effective tariffs, in violation of section 403(b) of the Federal Aviation Act of 1958, as amended (Act).

14. By reason of the acts described in paragraph 11, Capitol violated section 295.12 and/or section 249.10 of the Economic Regulations.

[Tr. 5]

15. By reason of the acts described in paragraph 12, Capitol violated section 295.35 and/or section 249.10 of the Economic Regulations.

WHEREFORE, the undersigned Enforcement Attorney respectfully prays the Board:

1. Order Capitol to cease and desist from violating sections 249.10, 295.12, and 295.35 of the Board's Economic Regulations;

2. Order Capitol to cease and desist from violating section 403(b) of the Act; and

3. Grant such other and further relief as the Board may deem proper.

/s/ Eric J. Byrne

Eric J. Byrne
Enforcement Attorney

Washington, D. C.
July 30, 1965

[Tr. 6]

VERIFICATION

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) SS

Eric J. Byrne, being first duly sworn on oath, deposes and says that he is an Enforcement Attorney of the Civil Aeronautics Board, that he has read the foregoing complaint and knows the contents thereof, and that the matters and things stated are true of his own knowledge, except

such matters and things therein stated upon information and belief, and as to such matters, he believes them to be true.

/s/ Eric J. Byrne

Eric J. Byrne
Enforcement Attorney

Subscribed and sworn to before me
this 30th day of July, 1965

/s/ Phyllis T. Kaylor

Phyllis T. Kaylor
Notary Public, D. C.

My Commission Expires November 30, 1967.

[SEAL]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Complaint and Petition for Enforcement upon the Respondent in this proceeding by mailing to it a copy of said Complaint and Petition for Enforcement in a properly addressed, franked envelope, certified mail.

/s/ Eric J. Byrne

Eric J. Byrne
Enforcement Attorney

Washington, D. C.
July 30, 1965

[Tr. 7]

Law Offices
SEAMON AND SULLIVAN
Woodward Building
Washington, D. C. 20005

RECEIVED
AUG 11 1965
CIVIL AERONAUTICS BOARD
CHIEF EXAMINER

August 10, 1965

Honorable Francis W. Brown
Chief Examiner
Civil Aeronautics Board
Washington, D. C. 20428

Re: Capitol Airways, Inc. - Enforcement
Proceeding, Docket 16370

Dear Mr. Brown:

On July 30, 1965 the Director, Bureau of Enforcement, docketed a petition for enforcement against Capitol Airways, Inc., respondent, in the proceeding as above captioned. Answer to the aforesaid complaint is due under the rules to be filed on August 16, 1965. It is the purpose of this letter to request that the time for filing answer be extended to September 7, 1965. This will further confirm that I have discussed the question of this postponement with the Director, Bureau of Enforcement, and he has authorized me to advise you that for the reasons hereinafter set forth, among others discussed with him, the Bureau of Enforcement has no objection to the requested postponement.

This office has been engaged for a number of weeks in two very extensive hearings, the United States-Caribbean-South America Investigation and the Reopened Transatlantic Charter Investigation, which have occupied well-nigh the full time of myself and associates. One of the hearings concluded today and the other is still in process as of this writing.

There has been no opportunity for the undersigned, who will personally handle this matter as Washington counsel for the company, to confer with company officials with respect to the matter nor to confer with

New York local counsel for the respondent, who is familiar with the underlying circumstances. There are certain collateral problems which must be reviewed carefully before final determination with respect to the company's position and answer can be made.

[Tr. 8]

Examiner Brown

August 10, 1965

In addition, I will be out of the country for two weeks beginning on or about August 16.

For the foregoing reasons the extension of time for answer to September 7 is respectfully requested and, as above noted, without opposition from the Bureau of Enforcement.

Very truly yours,

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

cc: Director, Bureau of Enforcement

[Tr. 9]

CIVIL AERONAUTICS BOARD

Washington, D. C.

20428

August 11, 1965

In Reply Refer To:

B-100

Mr. Theodore I. Seamon
Attorney for Capitol
Airways, Inc.
Seamon and Sullivan
Woodward Building
Washington, D. C. 20005

Dear Mr. Seamon:

Re: Capitol Airways, Inc.
Docket 16370

In accordance with your request of August 10, 1965, the time for filing Answer of Capitol Airways, Inc., to the complaint of the Bureau of Enforcement in Docket 16370 is extended from August 16, 1965, to September 7, 1965.

Very truly yours,

/s/ Francis W. Brown

Francis W. Brown
Chief Examiner

[Tr. 10]

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

RECEIVED

DOCKET SECTION

SEP 7 3:51 PM '65

**CIVIL AERONAUTICS
BOARD**

CAPITOL AIRWAYS, INC.

Respondent,

Enforcement Proceeding

Docket 16370

ANSWER OF

CAPITOL AIRWAYS, INC.

COMMUNICATIONS with respect to this Answer should be addressed to:

SEAMON AND SULLIVAN
700 Woodward Building
Washington, D. C. 20005

Attorneys for Capitol Airways, Inc.

JESSE F. STALLINGS
President,
Capitol Airways, Inc.
Berry Field
Nashville, Tennessee

September 7, 1965

[Tr. 11]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

 CAPITOL AIRWAYS, INC.

Respondent,

Enforcement Proceeding

Docket 16370

ANSWER OF

CAPITOL AIRWAYS, INC.

Comes now Capitol Airways, Inc. (hereinafter sometimes called "Respondent" or "Capitol"), through counsel, and for this, its answer to the above-captioned complaint, respectfully represents and alleges as follows:

1. Respondent admits allegations contained in paragraphs 1 and 2 of the complaint.^{1/}
2. Respondent does not have in its possession complete knowledge of all of the details alleged in paragraphs 3 and 4 but believes the information therein set forth to be true.
3. Respondent admits the allegation of paragraph 5.
4. With respect to paragraph 6, Capitol admits that on November 6, 1964, it executed a charter agency arrangement with Nelson Group Travel Corporation (Nelson); that said agreement was signed on behalf of Nelson by its President, Michael A. Friedman (Friedman); and that Nelson, as agent, was to receive a 5% commission of the base tariff charges. However, Respondent denies that Nelson was appointed agent "to solicit and develop aircraft charter traffic for the NYSTSG charter"; and that Nelson as agent

was to receive the aforesaid commission "for soliciting and developing the traffic carried". Said language was contained in the standard form of printed agency agreement executed between the Respondent herein and said

1/ Save as otherwise indicated, all references to numbered paragraphs refer to paragraphs as numbered in the complaint.

[Tr. 12]

alleged agent. In fact, Mrs. Friedman, the wife of Friedman, and a member and President of NYSTSG, had prior thereto developed and brought about the creation of the NYSTSG, which organization, to the best of Capitol's understanding, information and belief was developed and controlled by Mrs. Friedman. The organization employed Nelson to obtain the services of a carrier or carriers which would have aircraft available for the traffic generated into charter groups by Mrs. Friedman from within the organization, with the assistance of Nelson. Nelson was in fact agent for NYSTSG.

5. With respect to paragraph 7, Capitol admits the allegation that the charter price was \$52,331.00. Capitol is without direct knowledge, but can only assume the truth of the allegation, that the chartering organization collected from individual charter participants monies covering the entire cost of the charter trip. Capitol is without knowledge as to the extent to which, if at all, the funds collected were transmitted by the chartering organization to Nelson. Capitol did receive a total of \$35,466.20 applicable to the aforesaid charter price of \$52,331.00. Of the total amount received in partial payment, the amount of \$25,000.00 was represented by check made out by and in the name of NYSTSG payable to Capitol. Respondent admits that Nelson was its agent, but only in a limited sense for the flight in question; and further avers that Nelson also acted as agent for NYSTSG

and was therefore agent acting in a dual capacity for the Respondent and the chartering organization. To whatever extent funds were paid by NYSTSG to and in the name of Nelson, and so accepted by Nelson, the capacity of Nelson was that of agent for NYSTSG, the chartering organization, which was at all times on notice by the charter contract that all checks should be made payable to Capitol Airways, Inc. Respondent further avers that Nelson only acted for Respondent in a limited capacity, as aforesaid, in accordance with the Board's regulations and to insure submission of supporting information and necessary documentation; but that said Nelson was not so authorized as to bind or act for Respondent in any other way.

6. With respect to paragraph 8, Respondent admits that Nelson, as agent for the chartering organization, did not transmit to Respondent

[Tr. 13]

\$16,864.80, the balance of the charter price, and has not transmitted same to date. Respondent neither admits nor denies, but is without direct knowledge as to whether Nelson in fact received all or any part of said funds from the chartering organization.

7. With respect to paragraph 9, Respondent neither admits nor denies, but is without knowledge or information concerning the allegations that Nelson had received the balance of the amount covering the full cost of the charter. Respondent admits that Capitol, prior to the operation of the charter, collected an additional \$92.50 from each charter participant to cover the full cost of the charter as set forth in Capitol's currently effective tariff and as required by the terms and conditions of its certificate, but is without knowledge and therefore neither admits nor denies that Nelson had in fact received such balance from the chartering organization.

8. Capitol admits paragraph 10.

9. With respect to paragraph 11, Respondent avers that prior to the charter flight of July 1, 1965, Friedman, President of Nelson, was, on information and belief, arrested for unlawful conduct involving a check and financial transaction not in connection with the subject charter flight; and that prior thereto Friedman had absented himself from his place of business. Respondent exercised due diligence in its efforts to obtain the required supporting information. Respondent was precluded from so doing because of the absence of Friedman and the failure of Nelson to comply with the terms of the agreement and the requirements of the Board, constituting circumstances beyond Respondent's control, and which it could not reasonably have foreseen.

10. Respondent denies the allegation of paragraph 12, in that Capitol did obtain and retain the passenger manifest as required by Section 295.35 and Section 249.10 of the Economic Regulations.

11. Capitol denies the allegations contained in paragraphs 13, 14 and 15.

FIRST AFFIRMATIVE DEFENSE

12. Prior to the flight date, Respondent became aware of the circumstances involving Nelson (Friedman) (see Paragraph 8, supra) and that it

[Tr. 14]

could not be assured of the payment of the balance of the charter price as per Respondent's tariff prior to the performance of the July 1 charter flight for the NYSTSG.

13. Immediately thereafter, and prior to the charter date of July 1, 1965, Respondent called a meeting of the participating members of said proposed charter flight of July 1, and informed them of the nonpayment of the balance of the charter price; that since it then appeared that the payment of the charter price, as per Respondent's tariff, could not be collected

prior to the commencement of transportation as required by its certificate terms, Respondent was faced with the problem that the operation of said charter, having collected less than the tariff rate, would constitute a tariff violation and violation of the terms of its certificate; that Respondent was desirous of operating the charter but also of complying with all requirements of law, including the tariff, certificate and regulatory requirements, but that it was hesitant to operate the charter, having knowledge that the balance of its tariff would not be collected, which would be construed to be a discount or reduction in rate and thus violative of Section 403 of the Act and of the terms of its certificate; that under the circumstances Respondent was then considering the cancellation of the July 1 flight and the return to the participants of the monies theretofore transmitted to Respondent by and on behalf of the NYSTSG. The participating members of said charter group then present at the meeting requested that Respondent not cancel said charter flight and return to the participants the monies theretofore received by Respondent on account of said proposed flight. To the contrary, said participating members of the proposed charter flight requested they be given an opportunity to make payment of the balance of said charter price in view of their plans and commitments, and said members indicated that they would on their behalf proceed against Nelson (Friedman) to recover such funds to the extent same had been paid to and in the name of Nelson (Friedman).

14. At the instance and special request of said participating members, Respondent did agree to and did thereupon receive from said members of

[Tr. 15]

the group the balance of the charter price on a pro rata basis, and Respondent did then operate said July 1, 1965, charter.

SECOND AFFIRMATIVE DEFENSE

15. Respondent repeats and reiterates the allegations contained in answering paragraphs marked 12 to 14, inclusive, with the same force and effect as if same were fully set forth at length herein.

16. Upon discovery of the disappearance of Friedman and in light of the nonpayment of the balance of Respondent's charter price prior to July 1, 1965, Capitol consulted with its New York counsel in order to determine its legal position with respect to the non-receipt of the full charter price for the said charter flight of July 1, 1965. The questions of law and fact were considered by Respondent's New York counsel who then advised Respondent that if the balance of the tariff rate were not collected, the operation of the flight under such circumstances would constitute a tariff violation, a violation of Section 403 of the Act, and of the terms and conditions governing certificated transatlantic supplemental air transportation. Respondent was advised by said counsel that in view of the involved questions of law and fact the safe course would be to cancel said charter flight of July 1st and to refund the monies previously received by it pro rata to the participating members. Respondent was also advised by its New York counsel that the facts and questions of law should be made known to the participating members of said charter group as quickly as possible and prior to July 1, the scheduled date of departure of said charter trip so that said charter members would have an opportunity, if possible, to make other arrangements.

17. At the meeting held with the members of the charter group, Respondent was specifically requested to conduct said charter trip and that possible violation of the Regulations and Act be avoided by the payment by the chartering members of the balance of the tariff for such charter trip; and that said participating members would proceed against Nelson and/or Friedman for the funds alleged to have been paid by them.

18. In reliance upon the aforesaid representations, Respondent did accept the balance of said charter price from the participating members, as

[Tr. 16]

per its tariff, and did thereafter operate said charter trip on July 1, 1965. In doing so, as aforesaid, Respondent relied upon the advice of its New York attorney and counsel in its belief that it was thereby meeting the transportation requirements, complying with all regulations and provisions of law, and without violation of tariff provisions and certificate terms.

THIRD AFFIRMATIVE DEFENSE

19. Respondent repeats and reiterates the allegations contained in answering paragraphs marked 12 through 18, inclusive, with the same force and effect as if same were fully set forth at length herein.

20. Prior to the July 1, 1965 flight, Respondent disclosed all of the facts and circumstances to representatives of the Civil Aeronautics Board and the Bureau of Enforcement, and the action to be taken by Respondent to avoid a tariff and certificate violation, and in all respects Respondent cooperated fully with the Board's representatives.

21. Prior to the service of the enforcement complaint herein, Respondent was not aware that the Bureau of Enforcement might take a contrary view with respect to Respondent's actions, in reliance upon its New York counsel's legal opinion in the matter. Respondent believes that the advice given by its New York counsel was correct, and its actions in accord therewith in all respects lawful.

FOURTH AFFIRMATIVE DEFENSE

22. Respondent repeats and reiterates the allegations contained in answering paragraphs marked 12 through 21, inclusive, with the same force and effect as if same were fully set forth at length herein.

23. Because of the time element and the involved questions of fact and law existing at the time, as hereinabove set forth, Respondent relied upon the legal opinion of its New York counsel in permitting payment by the participating members of the balance of the charter price in accordance with Respondent's tariff regulations and the terms of its certificate.

24. Based upon the advice of its New York counsel it was Respondent's conclusion that unless it received the full unpaid balance of its charter price,

[Tr. 17]

the operation of the flight would constitute a tariff and certificate violation since said funds had not been received by Capitol either in fact or legal effect.

25. In view of all of the foregoing, the institution of this enforcement proceeding for the entry of a cease and desist order is unwarranted.

26. This matter arising out of disputed questions of mixed fact and law, involving one isolated flight, and in the unusual circumstances existing, does not warrant the time and expense to the Board and Respondent of prosecution of an involved formal enforcement proceeding. The relief sought in the nature of a cease and desist order is not warranted or necessary to insure the proper exercise of the Board's responsibilities and functions in the administration of the Federal Aviation Act, or to insure compliance by Capitol with requirements applicable to its services. Capitol is prepared to consider on an informal basis with appropriate representatives of the Board the circumstances and factors involved in this incident

and believes that through such informal conferences this matter can and should be satisfactorily resolved.

Respectfully submitted,

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

[Tr. 18]

VERIFICATION

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

Theodore I. Seamon, being first duly sworn on oath, deposes and says that he is attorney for Capitol Airways, Inc.; that he has read the foregoing Answer; and that with respect to all of the matters and things therein stated he believes them to be true upon information and belief.

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

Subscribed and sworn to before me
this 3rd day of September, 1965.

[SEAL]

/s/ Cora E. Hazes
Notary Public, D. C.

My Commission Expires 6-30-69.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Answer upon the Bureau of Enforcement by mailing to it a copy of said Answer in a properly addressed envelope, postage prepaid, certified mail.

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

Washington, D. C.
September 7, 1965

[Tr. 19]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that hearing in the above-entitled proceeding is assigned to be held on April 12, 1966, at 10:00 a.m. (eastern Standard Time) in Room 1027, Universal Building, Connecticut and Florida Avenues, N. W., Washington, D. C., before Examiner Barron Fredricks.

Dated at Washington, D. C., March 8, 1966.

/s/ Francis W. Brown
Chief Examiner

(SEAL)

PROOF OF SERVICE

I hereby certify that on [Tr. 20]
March 10, 1966

this Document was served
on parties listed below:

/s/ Judy Mitchell

Docket No. 16370

Service & Mail Clerk NOTICE OF HEARING

CERTIFIED

Capitol Airways, Inc.
Mr. J. F. Stallings, Agent
Berry Field
Nashville, Tennessee 37217

REGULAR

Mr. Harold Colvin,
Reservation Agent
Division of Educational Travel
National Education Association
1201 - 16th Street, N. W.
Washington 6, D. C.

Airborne Freight Corp.
Mr. J. D. McPherson, Agent
San Francisco International
Airport
San Francisco, California 94128

Mr. Theodore I. Seamon
700 Woodward Building
15th & H Streets, N. W.
Washington, D. C. 20005

DOCKET SECTION

POST OFFICE

Henderson
Aitchison
Meininger

Examiner: Fredricks Room-730

Byrne B-52
Burstein B-50
B-76, B-72

Directorate of Transportation, DCS/SNL
Headquarters, USAF
Washington 25, D. C.

Alderson Reporting Company

Dregge B-8
B-7
Clifton B-22
Brown B-100
B-71
B-10
Goldman B-30
B-31
G. Murphy B-37
Wrenn B-101
Ruth B-101
German B-74

[Tr. 21]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that hearing in the above-entitled proceeding is assigned to be held on April 12, 1966, at 10:00 a.m. (eastern Standard Time) in Room 1027, Universal Building, Connecticut and Florida Avenues, N. W., Washington, D. C., before Examiner Barron Fredricks.

Dated at Washington, D. C., March 8, 1966.

/s/ Francis W. Brown
Chief Examiner

(SEAL)

[Tr. 22]

CIVIL AERONAUTICS BOARD

Washington, D. C. 20428

In Reply Refer To: B-52

F-65-6

March 11, 1966

Mr. Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Washington, D. C. 20428

Dear Mr. Fredricks:

Re: Capitol Airways, Inc., Enforcement
Proceeding, Docket 16370

I am the attorney assigned to the above case. Hearing has been set for April 12, 1966, at 10:00 a.m., in Room 1027, Universal Building, Washington, D. C.

The transactions which form the basis for the complaint occurred in New York City, and all witnesses who will appear for the Bureau of Enforcement reside in or around New York City. It is requested, therefore, that

the hearing be reassigned to New York City on or about the date set forth above.

Your attention is appreciated.

Sincerely yours,

Eric J. Byrne

Eric J. Byrne
Enforcement Attorney
Bureau of Enforcement

[Tr. 23]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF CHANGE IN PLACE OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that public hearing in the above-entitled proceeding previously assigned to be held in Washington, D. C. on April 12, 1966, is hereby reassigned and will now be held before the undersigned on April 12, 1966, at 10 a.m. (eastern standard time) in Conference Room "B", 30 Church Street, New York, N. Y.

Dated at Washington, D. C., March 15, 1966.

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

(SEAL)

PROOF OF SERVICE
I hereby certify that on
March 17, 1966

[Tr. 24]

this Document was served
on parties listed below:

/s/ Judy Mitchell

Docket No. 16370

Service & Mail

Clerk

NOTICE OF CHANGE IN PLACE OF HEARING

CERTIFIED

Capitol Airways, Inc.
Mr. J. F. Stallings, Agent
Berry Field
Nashville, Tennessee 37217

REGULAR

Mr. Harold Colvin,
Reservation Agent
Division of Educational Travel
National Education Association
1201 - 16th Street, N. W.
Washington 6, D. C.

Airborne Freight Corp.
Mr. J. D. McPherson, Agent
San Francisco International
Airport
San Francisco, California 94128

Mr. Theodore I. Seamon
700 Woodward Building
15th & H Streets, N. W.
Washington, D. C. 20005

DOCKET SECTION

POST OFFICE

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Meininger

Examiner: Fredricks Room-730
Byrne B-52
Burststein B-50
B-76, B-72

Directorate of Transportation, DCS/SNL
Headquarters, USAF
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Alderson Reporting Company

Dregge B-8
B-7
Clifton B-22
Brown B-100
B-71
B-10
Goldman B-30
B-31
G. Murphy B-37
Wrenn B-101
Ruth B-101
German B-74

[Tr. 25]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF CHANGE IN PLACE OF HEARING

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Dated at Washington, D. C., March 15, 1966.

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

(SEAL)

[Tr. 26]

CIVIL AERONAUTICS BOARD

Washington, D. C. 20428

In Reply Refer To: B-52

F-65-6

March 17, 1966

Mr. Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Washington, D. C.

Dear Mr. Fredricks:

Re: Capitol Airways, Inc., Enforcement
Proceeding, Docket 16370.

For serious reasons of health, it would be extremely inconvenient for one of the Bureau's principal witnesses to give testimony during the week of April 10, 1966. I am, therefore, requesting that the hearing be reset for April 19, 1966, in New York City.

Mr. Theodore Seamon, attorney for Capitol Airways, orally informed me that he has no objection to this postponement.

Sincerely yours,

Eric J. Byrne

Eric J. Byrne
Enforcement Attorney
Bureau of Enforcement

cc: Theodore I. Seamon, Esq.

[Tr. 27]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF POSTPONEMENT OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that the hearing in the above-entitled proceeding previously assigned to be held on April 12, 1966, is postponed to begin on April 19, 1966, at 10 a.m. (eastern standard time), in Conference Room "B", 30 Church Street, New York, N. Y.

Dated at Washington, D. C., March 21, 1966.

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

(SEAL)

Tr. 28

- 30 -

PROOF OF SERVICE

I hereby certify that on
March 23, 1966

[Tr. 28]

this Document was served
on parties listed below:

/s/ Judy Mitchell

Docket No. 16370

Service & Mail

Clerk

NOTICE OF POSTPONEMENT OF HEARING

CERTIFIED

Capitol Airways, Inc.
Mr. J. F. Stallings, Agent
Berry Field
Nashville, Tennessee 37217

REGULAR

Mr. Harold Colvin,
Reservation Agent
Division of Educational Service
National Education Association
1201 - 16th Street, N. W.
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Mr. J. D. McPherson, Agent
San Francisco Int'l Airport
San Francisco, California 94128

Mr. Theodore I. Seamon
700 Woodward Building
15th & H Streets, N. W.
Washington, D. C. 20005

DOCKET SECTION

POST OFFICE

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Examiner: Fredricks Room-730
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Directorate of Transportation, DCS/SNL
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G. Murphy B-37
Wrenn B-101
Ruth B-101
German B-74

[Tr. 29]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

NOTICE OF POSTPONEMENT OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that the hearing in the above-entitled proceeding previously assigned to be held on April 12, 1966, is postponed to begin on April 19, 1966, at 10 a.m. (eastern standard time), in Conference Room "B", 30 Church Street, New York, N. Y.

Dated at Washington, D. C., March 21, 1966.

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

(SEAL)

[Tr. 30]

CIVIL AERONAUTICS BOARD

Washington, D. C. 20428

In Reply Refer To: B-52

F-65-6

April 1, 1966

Mr. Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Washington, D. C. 20428

Dear Mr. Fredricks:

Re: Capitol Airways, Inc., Enforcement
Proceeding, Docket 16370

Pursuant to Rule 19(c) of the Board's Rules of Practice in Economic Proceedings, the undersigned Bureau Counsel requests the issuance of the attached subpoenas, duces tecum.

The complaint in this proceeding alleges that Capitol Airways, Inc. (Capitol) overcharged passengers on the July 1, 1965, flight which it operated for the New York State Teachers' Study Group (NYSTSG), in violation of section 403(b) of the Federal Aviation Act of 1958. Specifically, it is

alleged that NYSTSG collected from individual passengers amounts covering the entire cost of the charter; that the funds collected were transmitted by NYSTSG either directly to Capitol, or to Nelson Group Travel Corporation (Nelson) for transmittal to Capitol; that Nelson received these funds from NYSTSG in the capacity of agent for Capitol; that part of the funds received by Nelson were not transmitted to Capitol prior to the operation of the flight; and that Capitol collected an additional \$92.50 from each passenger to cover the amount which Nelson had received from NYSTSG, but had not transmitted to Capitol. It is charged that Capitol committed a tariff violation by making this additional charge, since NYSTSG had transmitted to Capitol or its agent, Nelson, an amount covering the full cost of the charter.

Four of the attached subpoenas are addressed to passengers on the July 1, 1965, charter; one to Capitol Airways; one to Mrs. Sari Friedman, the president of NYSTSG; and one to the District Attorney of Westchester County, New York, who presently has possession of the records of NYSTSG and Nelson.

[Tr. 31]

Mr. Barron Fredricks (2)

Bureau Counsel submits that the requested documents will demonstrate (1) that passengers made full payment on the July 1, 1965, charter to NYSTSG; (2) that NYSTSG transmitted the money collected from passengers either to Capitol or Nelson; (3) that Nelson, in receiving these funds from NYSTSG, acted as agent for Capitol; (4) that Nelson did not transmit to Capitol all the funds which it received from NYSTSG; (5) that Capitol collected an additional amount from each passenger to cover the amount not transmitted

by Nelson; and (6) that Capitol was responsible for the loss of the money by its agent, Nelson.

Sincerely yours,

Eric J. Byrne
Enforcement Attorney
Bureau of Enforcement

Enclosures

[Tr. 32]

CIVIL AERONAUTICS BOARD

Washington, D. C. 20428

April 5, 1966

Mr. George Berkowitz
Counselor at Law
Woolworth Building
233 Broadway
New York, N. Y. 10007

Re: Capitol Airways, Inc.
Enforcement Proceeding
Docket 16370

Dear Mr. Berkowitz:

Your letter of April 1, 1966, requesting a prehearing conference in the subject case and the Bureau of Enforcement letter of April 5, 1966, opposing that request have been considered by me.

The Bureau's discussion of the several matters that you cite as lending themselves to settlement at a conference persuades me that a prehearing conference would contribute nothing to fair and expeditious disposition of the case. On the adverse side, assignment of a conference would tend to delay the hearing now set for April 19th.

The subject case is one that can appropriately go to hearing on the issues drawn by the pleadings, as contemplated by Rule 211 of the Rules of

Practice in Economic Enforcement Proceedings. A prehearing conference would serve no useful purpose and I therefore deny your request for assignment of such a conference.

Yours very truly,

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

Copy to each party

[Tr. 33]

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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APR 27 4:47 PM '66
CIVIL AERONAUTICS BOARD

In the Matter of:

CAPITOL AIRWAYS, INC., ENFORCEMENT
PROCEEDING

Docket No. 16370

Volume 1

Place New York, New York

Pages 1 thru 189

Date April 19, 1966

CSA REPORTING CORPORATION

Official Reporters

300 Seventh St., S. W. Washington, D. C.

393-2320

[Tr. 34]

A

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Sari Friedman	15	67	82 91	83	30
Michael S. Friedman	93	113	149	154	
Daniel Anthony Mitchell, Jr.	158	-	-	-	

E X H I B I T S

<u>NUMBER</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
BOE Exhibits 1 thru 25	7	
" " 26 and 27	19	67
" " 28 thru 54	23	
" " 55 thru 96	40	157
" " 97	50	
" " 98,99	101	102
" " 100 thru 104	104	154
" " 105	107	158
" " 106 and 107	170	171

[Tr. 35]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

-----:
In the Matter of:

CAPITOL AIRWAYS, INC., ENFORCEMENT : Docket No. 16370
PROCEEDING
-----:

Hearing Room B
Fourteenth Floor
30 Church Street
New York, N. Y.
Tuesday, April 19, 1966

The above-entitled matter came on for hearing,
pursuant to notice and notice of postponement, at 10:00 a.m.

B E F O R E:

BARRON FREDRICKS, Hearing Examiner

APPEARANCES:

ERIC J. BYRNE, ESQ., and
V. MICHAEL STRAUS, ESQ.,
Civil Aeronautics Board,
Washington, D. C.
Appearing on behalf of the Bureau of Enforcement,
Civil Aeronautics Board.

GEORGE BERKOWITZ, ESQ.
233 Broadway
New York, N. Y.

-and-

MESSRS. SEAMON & SULLIVAN
700 Woodward Building
Washington, D. C.
Appearing on behalf of the Capitol Airways, Inc.
By GEORGE BERKOWITZ, ESQ., of Counsel.

[Tr. 36]

APPEARANCES (Continued):

FRANCIS N. POLLACK, ESQ.
11 West 42nd Street
New York, N. Y.
Appearing on behalf of Teacher Members of
NYSTSG (Travel Committee)

[Tr. 37]

P R O C E E D I N G S

EXAMINER FREDRICKS: Let us come to order.

The Civil Aeronautics Board has set this time and place for this hearing in the Capitol Airways enforcement proceeding, Docket 16370.

I know you have given your appearances to the reporter. I am going to ask you for my own information if you will state them orally.

First for the Bureau of Enforcement.

MR. BYRNE: Eric J. Byrne.

MR. STRAUS: V. Micahel Straus.

EXAMINER FREDRICKS: For Capitol?

MR. BERKOWITZ: Seamon & Sullivan, 700 Woodward Building, Washington, D. C., and George Berkowitz, 233 Broadway, New York.

EXAMINER FREDRICKS: Now if there is no preliminary matter, the Bureau may proceed.

MR. BYRNE: Mr. Examiner, I would like to ask for a short recess at the beginning.

I subpoenaed the records of Capitol Airways and I just looked at the records a few moments ago, and I think we need time to sort them out so they can be presented into evidence.

EXAMINER FREDRICKS: Very well. How long a recess would you estimate?

[Tr. 38]

MR. BYRNE: I would say 15 minutes. Would that be all right, Mr. Berkowitz?

MR. BERKOWITZ: It's all right with me.

EXAMINER FREDRICKS: You have it. We will be recessed for 15 minutes.

(Recess.)

EXAMINER FREDRICKS: Let us come to order.

I understand there is one more appearance being entered.

MR. POLLACK: Yes, sir. I would like with your permission to note my appearance for the record.

My name is Francis N. Pollack, 11 West 42nd Street, New York, New York 10036.

I represent the Travel Committee formed by the teacher members of the New York State Teachers' Study Group, and I would like permission to intervene here, should I deem it expedient or necessary.

EXAMINER FREDRICKS: Well, Mr. Pollack, the Board's rules provide a means of intervening and I would have to be convinced if I were to circumvent the rule.

If occasion should arise, of course, you may raise the point and tell me what you think you need to do.

MR. POLLACK: Right, and may I, if I deem it expedient, likewise cross-examine any of the witnesses

present?

EXAMINER FREDRICKS: I am a little troubled with that.

MR. BERKOWITZ: I would object to that, Mr. Examiner. I think that certainly would not make for an orderly hearing and the cross-examination by a person who is not a party to the proceeding and not an intervenor I think would be highly improper.

EXAMINER FREDRICKS: Do you have a view on that Mr. Byrne?

MR. BYRNE: I would be inclined to object upon his cross-examining any witnesses, because I think his purposes are different than the purposes of the Bureau of Enforcement, and might involve a complaint in a civil court against possible parties in this proceeding.

EXAMINER FREDRICKS: This is a narrow proceeding, Mr. Pollack.

MR. POLLACK: I understand that.

EXAMINER FREDRICKS: I think you appreciate that. There are only two parties.

MR. POLLACK: I know that.

EXAMINER FREDRICKS: The Bureau of Enforcement and the respondent, Capitol Airways, and I have a duty not to let it overrun its banks.

MR. POLLACK: Well, may I have your permission then,

[Tr. 40]

either during or subsequent to the conference or the hearing this morning, to examine the documents?

I was granted such permission by the Bronx District Attorney's office when the records were up there, but during the course of our examination, the CAB took many of the documents that were present, and now the Westchester County DA's office has many of the records because they are in the process of conducting the investigation now.

EXAMINER FREDRICKS: The documents will become a part of the record. Now I am not in a position to make available the set that Mr. Byrne has given me because I don't know yet--

MR. POLLACK: I understand.

EXAMINER FREDRICKS: -- until they are offered and Mr. Berkowitz has had a chance to object, whether they are in or out of the record, and they aren't my property--

MR. POLLACK: I understand.

EXAMINER FREDRICKS: --at this point.

I would say it would depend on your working out with counsel.

MR. POLLACK: Fine.

EXAMINER FREDRICKS: As soon as documents are received in the record I would have no objection to your

[Tr. 41]

examining them.

MR. POLLACK: I didn't mean before, sir. I meant afterwards.

EXAMINER FREDRICKS: Subject to the proceeding going forward. I can hardly part from it against the possibility of having to refer back.

MR. POLLACK: I certainly wouldn't want to violate any of the regulations of course.

EXAMINER FREDRICKS: Well, Mr. Byrne, you may proceed.

MR. BYRNE: Yes.

Mr. Examiner, Mr. Berkowitz and myself have entered into a stipulation. We stipulate that these records here are records of Capitol Airways with respect to a flight for the New York State Teachers' Study Group on July 1, 1965.

EXAMINER FREDRICKS: You are going to identify the records to which you stipulated?

MR. BYRNE: Yes. I have these marked already BOE Exhibits 1 through 25.

(BOE Exhibits 1 through 25 were marked for identification.)

EXAMINER FREDRICKS: Are those in the same sequence as the set that was given to me, so that we can be sure?

[Tr. 42]

MR. BYRNE: I think they are, roughly. They may not be exactly the same.

EXAMINER FREDRICKS: Well, I think we should have a correctly marked set for the duplicate docket.

MR. BYRNE: Yes.

Well, the only document that is different, Mr. Examiner, is the passenger manifest. This is a different version of the passenger manifest than the copy that I gave to you.

All the other documents are exactly the same as I gave to you.

EXAMINER FREDRICKS: The passenger manifest is made up of a number of pages, is that right?

MR. BYRNE: Yes, that's true.

I believe there are seven pages.

It might be helpful if we check the copies with the originals.

EXAMINER FREDRICKS: I think that would be well.

What you had better do, Mr. Byrne, is to go through these exhibits, describing them very briefly and giving them an exhibit number at the time.

MR. BYRNE: Yes.

All right.

Mr. BERKOWITZ: Mr. Byrne, before you do that, you

[Tr. 43]

have my set. Do you have a copy . . . for me that I can follow you?

MR. BYRNE: Yes.

MR. BERKOWITZ: You see, Mr. Examiner, these are my copies and I have nothing to be guided by now.

EXAMINER FREDRICKS: Yes.

MR. BYRNE: BOE Exhibit 1 is a contract between Capitol Airways and the New York State Teachers' Study Group.

EXAMINER FREDRICKS: That is the aircraft charter contract?

MR. BYRNE: That's correct.

BOE Exhibit 2 is an agency contract between Nelson Travel Service and Capitol Airways.

BOE Exhibit 3 is a letter to Michael Friedman from Walt Schofield, dated November 9, 1964.

BOE Exhibit 4 is a letter to Mr. Friedman from Daniel Mitchell, dated December 29, 1964.

BOE Exhibit 5 is a letter to Mr. Friedman from Daniel Mitchell, dated January 4, 1965.

BOE Exhibit 6 is a letter to Mr. Friedman from Daniel Mitchell, dated January 14, 1965.

BOE Exhibit 7 is a letter to Mr. Friedman from Daniel Mitchell dated March 5, 1965.

BOE Exhibit 8 is a letter to Mr. Friedman

[Tr. 44]

from Daniel Mitchell, dated March 31, 1965.

BOE Exhibit 9 is a letter to Mr. Friedman from Daniel Mitchell, dated April 30, 1965.

MR. BERKOWITZ: Just a moment.

EXAMINER FREDRICKS: Off the record.

(Discussion off the record.)

MR. BYRNE: BOE Exhibit 10 is a letter to Mr. Friedman from Daniel Mitchell, dated May 11, 1965.

BOE Exhibit 11 is a letter to Mr. Friedman from Daniel Mitchell, dated May 27, 1965.

EXAMINER FREDRICKS: Off the record a moment.

(Discussion off the record.)

MR. BYRNE: BOE 12 is a copy of a check, with the signature of Michael Friedman, to Capitol Airways, which is stamped "Payment stopped."

MR. BERKOWITZ: What is the amount of that check?

MR. BYRNE: \$20,932.40.

It also has a second attachment, BOE Exhibit 13, debit advice from the First National City Bank for \$20,932.40.

MR. POLLACK: What is the date of that check, Mr. Byrne?

MR. BYRNE: The check marked BOE Exhibit 12 is dated May 12, 1965.

BOE Exhibit 14 is a letter from Daniel Mitchell

[Tr. 45]

to Mr. Friedman, dated June 10, 1965.

BOE Exhibit 15 is a bank deposit slip dated January 11, 1965, First National City Bank.

MR. BERKOWITZ: Excuse me.

My copy is hard to read. Is that a total of ten thousand- --

MR. BYRNE: -- -six hundred and eighty dollars, yes.

BOE Exhibit 16 is a bank deposit slip for the First National City Bank, dated February 9, 1965.

MR. POLLACK: The amount?

MR. BERKOWITZ: Excuse me. My copy is completely illegible.

If you would good enough to give me the items I could write them in.

MR. BYRNE: Yes.

The three deposits listed are for \$1,044.75; the second one is \$1,044.75; the third is for \$5,185.20.

MR. BERKOWITZ: The total is how much?

MR. BYRNE: There is no total listed.

MR. BERKOWITZ: Is there a bank stamp on it?

MR. BYRNE: Yes.

MR. BERKOWITZ: And the deposit date was--

MR. BYRNE: February 9, 1965.

BOE Exhibit 17 is a bank deposit slip dated

[Tr. 46]

May 17, 1965, in the amount of \$20,932.40.

There is a notation on this deposit slip, "stop payment."

MR. BERKOWITZ: You say what date there, Mr. Byrne?

MR. BYRNE: May 17, 1965.

MR. BERKOWITZ: 20,932.40?

MR. BYRNE: That is correct.

MR. BERKOWITZ: My copy has May 11, on it. The bank stamp--

MR. BYRNE: Well, the bank stamp says May 17th.

MR. BERKOWITZ: Oh, I see.

MR. BYRNE: That is the First National City Bank.

BOE Exhibit 18 is a bank deposit slip on the First National City Bank for \$25,000, dated June 9, 1965.

Now BOE Exhibits 19 through 25 are a passenger manifest for a flight of July 1, 1965.

Mr. Examiner, I would like to offer these documents marked BOE Exhibits 1 through 25 into evidence.

EXAMINER FREDRICKS: Let's identify the manifest page by page, if you will, Mr. Byrne.

MR. BYRNE: Oh, yes.

EXAMINER FREDRICKS: BOE 19, is that the first page of the manifest?

[Tr. 47]

MR. BYRNE: Well, the copy that you have, Mr. Examiner, is different from the original that I have. I believe it's a different version of the manifest, so I believe. I do not have a copy of that manifest. This is the first time I saw this.

EXAMINER FREDRICKS: All right.

Will you supply a photocopy for the duplicate docket?

MR. BYRNE: Yes.

EXAMINER FREDRICKS: And transmit it to me so that it will go with the set that I am retaining?

MR. BYRNE: Yes, I will, Mr. Examiner.

MR. BERKOWITZ: And will you supply me with a copy of that?

MR. BYRNE: Of course.

EXAMINER FREDRICKS: And we will sidetrack this different version of the manifest--

MR. BYRNE: For the time.

EXAMINER FREDRICKS: -- that's in the set I am holding.

MR. BYRNE: Mr. Examiner, I again would like to offer these documents marked BOE Exhibits 1 through 25 into evidence.

EXAMINER FREDRICKS: Yes, on the basis of the stipulation which has been stated.

[Tr. 48]

Mr. Berkowitz?

MR. BERKOWITZ: May I say this, that I certainly have no objection that these are copies of the documents, but whether they are material or relevant becomes another question.

I would like to reserve on that at this time until the case progresses, to see what evidence is submitted.

So I would suggest that they either be marked for identification at this time and taken into evidence at the appropriate time, or else subject to connection.

EXAMINER FREDRICKS: Yes, I see no problem about that. They are simply marked for identification at this time and, if you will renew the offer by the time you conclude your presentation, we can then deal with admission of them into evidence.

MR. BYRNE: Yes, Mr. Examiner.

EXAMINER FREDRICKS: Mr. Byrne, I have in the set that was given in the three other photocopy sheets and I am not precisely sure how you would describe them, but I take it that for the present they are not to be identified.

MR. BYRNE: That is correct.

EXAMINER FREDRICKS: Yes, sir.

MR. BYRNE: Mr. Examiner, at this time I would like to call Mrs. Sari Friedman to the stand.

[Tr. 49]

EXAMINER FREDRICKS: Very well.

Whereupon,

SARI FRIEDMAN,

was called as a witness, and having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q Mrs. Friedman, will you please state your full
name and address for the record?

A Sari Friedman, 2260 Bronx Park East, Bronx,
New York.

Q What is your present employment?

A I am a teacher for the New York City School
System.

Q I see.

How long have you been a teacher?

A Since March of 1957.

Q I see.

Were you ever connected with a group called the
New York State Teachers' Study Group?

A Yes, I was.

Q Did you hold any positions with this group?

A Yes.

Q What position was this?

A Well, originally I was a member of just the Flight

[Tr. 50]

Committee. When it became incorporated, I was president.

Q How long were you president? During what period were you president?

A From approximately November 1964, beginning that time.

Q What were the requirements for membership in this organization?

A The members were bona fide teachers in the State of New York, and throughout the State of New York, limited to teachers in the state.

Q What type of activities did the study group engage in?

A Well, they exchanged information about study abroad. That's how it had originally been organized, even before I was connected with it, and where increments and differentials were available and then as an outgrowth of this flights were made available for many of the teachers who were going over for study or for recreational purposes and so forth.

Q The New York Teachers' Study Group, you said, chartered aircraft?

A Yes, sir.

Q Did you have any duties with respect to the chartering of these aircraft while you were president and a member of the Flight Committee?

[Tr. 51]

A I didn't charter them directly, but I would with other people handling the paper work involved in collecting the money for these flights and so forth.

Q I see.

Did the study group charter any aircraft prior to the summer of 1965?

A Yes, they had done it, I think beginning in either '61 or '62.

I don't recall, because I wasn't active with them at the time.

Q I see.

While you were active with them?

A That I knew of, the summer of '63, '64 and for '65.

Q I see.

Now in the course of your duties as president of the study group--

A Um hmm.

Q -- did you hold out that certain charters would be operated for the study group during the summer of 1965?

A Yes.

MR. BERKOWITZ: That's objected to, calling for the conclusion, did she hold out and so forth. It's leading. It calls for a conclusion.

EXAMINER FREDRICKS: Well, it does seem to be

[Tr. 52]

leading.

Q Did you put out advertising, were you responsible for advertising in which it was stated that certain flights would be operated during the summer of 1965?

A There were--

MR. BERKOWITZ: Just a moment. I object to that on the ground that this question now calls for the content of advertising which is not in evidence and for the witness to describe this type of advertising.

I think this is worse than the previous question. The best evidence would be the advertising.

EXAMINER FREDRICKS: I suppose you would want to ask the witness what her activities were in the Flight Committee in this period.

Q Well, did you collect money for certain flights during the summer of 1965?

A The study group collect money, yes.

Q How many flights did you collect money for, Mrs. Friedman?

A Approximately five.

Q On what dates did you state to these people who were paying money for these flights that these flights were supposed to operate?

MR. BERKOWITZ: That's objected to. There is no such proof that she ever made such statements to these people.

[Tr. 53]

Counsel is assuming certain things in his question which are not in evidence.

EXAMINER FREDRICKS: I think the form of the question is objectionable, Mr. Byrne.

MR. BYRNE: Excuse me, Mr. Examiner.

EXAMINER FREDRICKS: Yes.

MR. BYRNE: I will try to obviate that objection.

Mr. Examiner, I would like to have these two documents marked for identification, BOE Exhibits 26 and 27.

EXAMINER FREDRICKS: How are those identified, Mr. Byrne, what you asked to be marked?

MR. BYRNE: These purport to be copies of material of the New York State Teachers' Study Group.

EXAMINER FREDRICKS: They are so marked for identification.

(BOE Exhibits 26 and 27 were marked for identification.)

MR. BYRNE: Thank you.

EXAMINER FREDRICKS: Each is a single page, is that right?

MR. BYRNE: Yes.

Q Mrs. Friedman, I ask you to look at this material. Do you recognize these as copies of material put out by the New York State Teachers' Study Group?

[Tr. 54]

A Yes, I do.

Q Would you please read into the record from Exhibit BOE 27--

MR. BERKOWITZ: Just a moment. I object to reading into the record from a paper which is not evidence, which has just been marked for identification.

EXAMINER FREDRICKS: I think that objection is one I have to sustain.

Q Were you responsible for putting out this material?

A Well, the group put it out, yes, upon information supplied.

We didn't do the actual printing, if that's what you mean. It was printed for us.

Q All right, Mrs. Friedman.

Now you said that you collected money from persons for certain flights for the summer of 1965?

A The study group collected money, yes.

Q Were you responsible for collecting money?

A Well, it would come through, yes.

Yes.

Q How do passengers make payments for these flights?

A Well, they were installment payments made out to the corporation, to the study group.

Q Where did people send these payments to?

[Tr. 55]

A To Bronx Park East address, to the study group in care of the Bronx Park East address.

Q Is that address your personal residence?

A Yes.

Q Did you keep a record of the payments made by persons for these flights?

A Oh, yes, indeed.

MR. BYRNE: Mr. Examiner, I have here what purports to be a cash receipts and disbursements book. I would like to have certain pages which are set aside here marked BOE Exhibits 28 through 55.

EXAMINER FREDRICKS: The pages are so marked for identification. You have already marked them?

MR. BYRNE: I have not marked the numbers on the pages as of this time.

EXAMINER FREDRICKS: You have not marked?

MR. BYRNE: I have not marked.

EXAMINER FREDRICKS: Yes. Well, I mean we will have to identify what we are marking.

MR. BYRNE: Do you wish me to recite each page?

EXAMINER FREDRICKS: Well, if you could do it tersely by beginning and end or the range of dates.

MR. BYRNE: Well, the first page, which would be BOE Exhibit 28, is marked number one on the top.

It contains a list of names, beginning with Edith

[Tr. 56]

Oswald.

I would have this page and the next succeeding pages-- there are eight pages-- marked for identification.

EXAMINER FREDRICKS: Eight consecutive pages?

MR. BYRNE: Eight consecutive pages.

EXAMINER FREDRICKS: Beginning with the one that list, that starts with the name Edith Oswald?

MR. BYRNE: Oswald.

EXAMINER FREDRICKS: Very well. They are so marked.

MR. BYRNE: I would like to have the page with the marked number two on the top.

The first name on the list is Samuel Fierro. I would like to have this marked for identification.

EXAMINER FREDRICKS: As BOE 36?

MR. BYRNE: Yes.

EXAMINER FREDRICKS: It is so marked.

MR. BYRNE: The next succeeding pages, there would be eight more pages.

EXAMINER FREDRICKS: All right. They will be marked through BOE 44.

MR. BYRNE: Yes.

EXAMINER FREDRICKS: Consecutively.

MR. BYRNE: Now I have another series of pages.

This page has a number six on the top and it begins with the

[Tr. 57]

name Marion Simon.

EXAMINER FREDRICKS: Is that Marion i-a-n or o-n?

MR. BYRNE: O-n, and the next four succeeding pages marked for identification.

EXAMINER FREDRICKS: Very well. They will be marked BOE 45 through 49.

MR. BYRNE: And finally the page with the number seven on top, beginning with Davis Schorr, and the next succeeding four pages.

EXAMINER FREDRICKS: Those will be marked 50 through 54 for identification.

MR. BYRNE: Yes.

(BOE Exhibits 28 through 54 were marked for identification.)

By Mr. Byrne:

Q Mrs. Friedman--

A Yes?

Q -- I would like you to look at the pages of this book which are marked BOE Exhibits 28 through 54.

I would like you to look through those pages and tell us if you made the entries contained on those pages.

A I made many of them, but not all of them.

Q Who made the other entries?

[Tr. 58]

A There were other people that helped me on this.

A Mrs. Gannon and a Miss Evars, among others, worked with me.

Q Did they work under your supervision and direction?

A Yes, generally. I advised them. I wasn't always there when they made the entries, but they did.

Q Now I refer you specifically to the pages which are marked BOE Exhibits 28 through 35.

A Yes.

Q Would you please tell us what the entries on those pages represent?

MR. BERKOWITZ: That's objected to, stating on the record what certain pages represent, indicating something which is not in evidence, which I respectfully submit is not proper.

EXAMINER FREDRICKS: I don't think I understand the objection.

MR. BERKOWITZ: I respectfully object on the ground that the witness is now being recalled to read into the record from a ledger book, sheets of a ledger book which have only been marked for identification and not in evidence.

So this by indirection will put into evidence something which is not now in evidence.

[Tr. 59]

EXAMINER FREDRICKS: I didn't understand the question that it involved a request for her to read the contents, but to describe the nature of these pages.

MR. BERKOWITZ: If that's what the question is limited to, I will at this time withdraw my objection.

EXAMINER FREDRICKS: Well, Mr. Byrne will have to tell me whether that was the meaning of it.

MR. BYRNE: I am not asking her to state what the entries are. I am just asking her, when she put these entries in, what did they signify.

MR. BERKOWITZ: That I think is a matter that the Hearing Examiner has to determine, the effect of such entries; what they signify is something which I think this witness is not in a position to signify to, as an expert or otherwise.

EXAMINER FREDRICKS: Well, these pages are, at least purportedly, a record, and the witness on the testimony we have already heard seems to have been in charge of keeping the record.

She is asked to tell what this particular portion of the record represents.

MR. BERKOWITZ: Perhaps to expedite matters, might I ask Mr. Byrne, please, at this time what the purpose of these records is, in other words, what he intends to do, to offer them for what purpose?

[Tr. 60]

Perhaps I can concede or stipulate as to certain things.

MR. BYRNE: The purpose of this is to show that certain persons made payments for flights, for New York State Teachers' Study Group flights.

MR. BERKOWITZ: As indicated by the entries in that book?

MR. BYRNE: And indicated by the entries in the book.

MR. BERKOWITZ: Which might I ask this: Does this relate only to the flight conducted by Capitol or to other flights?

MR. BYRNE: Well, it refers to a flight by Capitol Airways on July 1, 1965.

It also shows that certain persons made payments for flights that were held out to be operated on other dates besides this flight for July 1, 1965.

MR. BERKOWITZ: You see, Mr. Examiner, I think the witness testified that they collected moneys for five flights.

Capitol made one agreement, one charter agreement, and was obliged to conduct one flight.

And what I have in mind is the possible impropriety of putting into the record material which has to do with other flights not connected with Capitol.

[Tr. 61]

MR. BYRNE: May I please explain, Mr. Berkowitz, the reason I am putting these payments on the flights in is for the simple reason that certain persons who paid for these other purported flights actually at the end went on this flight of July 1, 1965, and the only reason I am putting all of these pages in is to show that these persons paid a certain amount of money originally.

It is not to give any implication that Capitol had any contract for flights on other dates besides the one on July 1st.

MR. BERKOWITZ: All right, with that understanding, I at this time will withdraw my objection.

EXAMINER FREDRICKS: Very well.

You may answer the question.

The reporter will read it to you if you prefer.

THE WITNESS: Yes, would you, please?

(Last two questions and intervening answer were read by the reporter.)

A I thought I had answered that, that they represent--

MR. BERKOWITZ: I can't hear.

A (Continuing) They represent payments made for study group flights and also cancellations and refunds when they were issued.

Q What do these entries on the top of the page signify?

[Tr. 62]

A The date of the flight and its destinations and the price to members.

Q What amount did you charge each person on this?

A On this particular flight?

Q This particular purported flight.

A The study group, the price of that London-Paris flight was 270.

Q I now refer you to the pages of this book which are marked BOE Exhibits 36 through 39.

What do the entries on those pages represent?

A They represent a charter flight from New York to Paris and to Rome, July 1 to September 3.

Q What was the amount you charged each person on these flights?

A The study group charged \$280 on the Paris round-trip and \$310 on the final destination being Rome.

MR. BERKOWITZ: Excuse me, Mr. Byrne. If I may interrupt at this moment, are these both flights allegedly July 1st of Capitol? You talk of--

MR. BYRNE: Yes. Mrs. Friedman testified that the pages marked BOE Exhibit 36 through 39 refer to payments on the Paris portion of that flight.

Q Now, Mrs. Friedman, as to the pages which are marked BOE Exhibits 40 through 44, what do the payments of that represent?

[Tr. 63]

A Well, the same flight but the Rome portion, the Rome-Paris portion.

Q I see.

Now I show you the pages marked BOE Exhibits 45 through 49.

Now what do the entries on these pages represent?

A A charter flight, New York-Paris, from July 4 to September 5, 1965.

MR. BERKOWITZ: Well, I object to that. That's not involved.

MR. BYRNE: This is a purported flight.

MR. BERKOWITZ: Yes. That's not involved in this case.

MR. BYRNE: Again I reiterate that the reason I am offering these pages is because certain persons who paid for a flight on July 4th actually went on the Capitol flight of July 1, 1965.

That's the only reason these pages are being presented into evidence.

MR. BERKOWITZ: I don't understand it. Those names are separately identified in some way?

MR. BYRNE: Yes, each name is separately listed.

Q Now finally I show you the pages marked BOE Exhibits 50 through 54.

A Yes. Well, that represents the Rome-Paris portion of

[Tr. 64]

the same flight, July 4 to September 5.

Q Mrs. Friedman, are the entries on these pages a true and accurate record of payments made by persons for these flights?

A Yes, they are.

Q Did you make these entries in the regular course of your duties?

A Yes, on those and on index cards, too, there was entered into two different places.

MR. BYRNE: Mr. Examiner, I offer the pages marked BOE Exhibits 28 through 34 into evidence.

MR. BERKOWITZ: May I at this time have a voir dire on this record being offered?

EXAMINER FREDRICKS: Yes, surely.

VOIR DIRE EXAMINATION

By Mr. Berkowitz:

Q Mrs. Friedman, you testified that entries were made by you, by Mrs. Gannon and Mrs. Edwards?

A Miss Evars.

Q Evars?

A Yes.

Q And who else?

A I believe it was just those three.

I am trying to think if there was anybody else.

There may have been but I don't recall.

[Tr. 65]

Q You said three?

A Myself, Mrs. Gannon, Miss Evars.

Q Was this flight, this record, this ledger book--

A Yes.

Q -- also at the office of the Nelson Group Travel Corporation?

A No.

Q You kept this in your home?

A Yes.

Q And Mr. Friedman, the president of Nelson Group Travel, was your husband?

A Yes.

Q Is your husband, rather?

A Yes, sir.

Q And this book which I now have before me, produced by Mr. Byrne, did you turn this over to Mr. Byrne?

A No. No, I did not.

The records were turned over to the Bronx District Attorney's office.

Q I see.

A And Mr. Byrne, I assume, I got it from--

Q Got it from that office so far as you know?

A Then, yes. Yes.

Q Now in this book the entries start in what year?

A I believe this would be 1964.

[Tr. 66]

Q 1964?

A Yes, probably about September or October. I don't remember exactly.

Q And the last entry was made, do you recall when?

A No, I don't. Probably towards the end of June. I couldn't tell you the exact date.

Q Now did an accountant ever examine this record, an accountant for the New York State Teachers' Study Group?

A No.

Q And except for the time that you turned it over to the Bronx District Attorney's office--

A Um hmm.

Q -- was this record in your home?

A I believe it was all the time. I am trying to think Miss Evars ever took it with her. I don't believe so.

Q Well, did the other lady ever take it with her, Mrs. Gannon?

A I don't know. She may have taken to her home to do some of the work. I couldn't tell you exactly. I don't remember whether she ever did this on occasion or not.

Q And these ladies, Mrs. Gannon and Miss Evars, did they make more entries than you or vice versa?

A It's hard to say. I don't recall offhand.

[Tr. 67]

Q And were there times when they made entries or made notations when you were not at home?

A Oh, yes.

Q And were those entries more in number than when you were at home?

A I really don't know.

Q You don't know, and have you seen this book again since you turned it over to the District Attorney's office?

A Just--

Q Just now?

A Just now, yes.

Q You haven't seen it between the time you took it from the District Attorney's office and the time you saw it today?

A No.

Q Has this book ever been audited as far as you know?

A By the District Attorney's office I assume, but I don't know.

Q When these entries were made of different things and amounts, was that on the basis of a check received from a person whose name was entered?

A Yes.

Q And what would happen, if, say, a check would not be paid?

[Tr. 68]

A You mean if it did not clear the bank--

Q Yes.

A -- or something?

Q Yes.

A Well, the person would be notified.

Q Would such an entry be made in the book?

A Yes, it would be. I am trying to think if there were any checks like that.

There may have been, that were re-deposited.

I don't recall offhand. It's been a long time.

Q And altogether this book represents people who paid moneys for five different flights?

A Um hmm. Tours.

Q And other than Capitol Airways can you recall what other airlines were supposedly involved?

A Yes, British Eagle Airways. I don't know the exact terminology.

Q British Eagle?

A Yes, and World Airways.

Q How about Trans International?

A I didn't know anything about Trans-International.

Q Were there possibly more than Eagle and World Airways that you don't know about or is it--

A Well, I have found out there was deposited with Trans International, but I did not at the time it was received.

[Tr. 69]

Q So there were three other airlines?

A Well, two others.

Q Yes, but you found out later there was another, Trans International?

A Yes, um hmm.

Q So that actually when you answered Mr. Byrne's question, these other ladies did not make their entries under your supervision but they made them independently, isn't that so?

A Well, I assume Mr. Byrne was referring to the way the entries were made, the method.

I didn't personally supervise the making of the entries, but it was just the system.

Q You just instructed them in advance how they would do it, and you assumed it was done in that way?

A Yes, sir.

Q And you didn't take the trouble to find out if that was the way it was entered?

A Well, we looked to see if there was any discrepancies.

Q How did you check for discrepancies?

A We checked with the cards.

MR. BERKOWITZ: I object. This witness is not in a position to testify on this record. These entries were made by other individuals, two other individuals, which she did

[Tr. 70]

not supervise and she so admits, and she doesn't know whether it's the same record now as it was when it was taken from her home to the District Attorney's office.

There is no proof that it is a valid record. They weren't under her control.

MR. BYRNE: She testified that she made these entries and she can testify that she instructed these persons to make these entries in the books, and I certainly think that the pages of this book are admissible for that purpose.

May I state, when any person or any corporation keeps books, the person who is ultimately responsible for the books doesn't supervise the entries or every item that's in the book.

It would be impossible to introduce any book into evidence.

EXAMINER FREDRICKS: You have offered, Mr. Byrne, in evidence Exhibits BOE 28 through BOE 54, which are pages of this ledger journal kept in behalf of the teachers' group.

Mr. Berkowitz has objected on the ground that some of the entries were made by persons other than Mrs. Friedman.

As I understand Mrs. Friedman's testimony, it is sufficient to verify this material to the extent of making

[Tr. 71]

it admissible.

I do admit it.

MR. BERKOWITZ: I respectfully except to your Honor's ruling.

EXAMINER FREDRICKS: Yes, your exception is of course automatic and it is available--

MR. BERKOWITZ: It is merely habit, Mr. Fredricks.

EXAMINER FREDRICKS: -- on the Board's review of the initial decision that I will make.

By Mr. Byrne:

Q Now, Mrs. Friedman, when you received these payments from persons for these flights, what did you do with the payments?

A After they were entered the checks were deposited in the study group account.

Q I see. Where was this account kept?

A At the Manufacturers Hanover Trust Company, White Plains Road, in the Bronx.

Q I see. Now as regards the payments which were to be made to the air carriers--

A Yes.

Q -- for these flights--

A Um hmm.

Q -- to whom did you make these payments?

A Well, some of the tour payments were paid directly

[Tr. 72]

to the tour agency, like UNITOURS, and so forth.

MR. BERKOWITZ: Who?

THE WITNESS: UNITOURS.

A (Continuing) The airline payments were made mostly to the agent. There were some payments to the airlines as well.

Q Who was the agent of the flights?

A Nelson Group Travel.

Q I see.

Now what about payments for such items as charter expenses like advertising and expenses of that nature?

A Well, Nelson had the facilities for rexigraphing material and so forth, and they did have some of the mailings for us.

I guess they had a mailing room where they could distribute, could work for, more easily than can be done in the premises.

Q To whom did you make these payments?

A To Nelson Group Travel or Nelson Travel Service originally.

MR. BERKOWITZ: Which payments are you referring to?

MR. BYRNE: Payments for charter expenses such as she just specified.

[Tr. 73]

EXAMINER FREDRICKS: Let us go off the record for just a moment.

(Discussion off the record.)

EXAMINER FREDRICKS: Back on the record.

MR. BYRNE: Mr. Examiner, I have what purports to be a series of checks, 36 checks in all.

I would like to have these marked for identification BOE Exhibits 55 through approximately 81 or 80.

EXAMINER FREDRICKS: How many checks?

MR. BYRNE: 36 checks.

EXAMINER FREDRICKS: Through 80. 55 through 80. Very well. They had better be physically marked.

MR. BYRNE: Yes.

EXAMINER FREDRICKS: Either you or the reporter may do that.

MR. BERKOWITZ: What numbers, Mr. Byrne?

MR. BYRNE: 55 through approximately 80.

Oh, you mean the number of the checks?

MR. BERKOWITZ: No, I am talking about the exhibit numbers?

MR. BYRNE: That will be 55, starting on BOE Exhibit 55.

MR. BERKOWITZ: Well, are they in chronological order?

MR. BYRNE: Yes, they run in chronological order.

[Tr. 74]

(BOE Exhibits 55 through 96 were marked for identification.)

EXAMINER FREDRICKS: All right. We will be back on the record.

Will you identify by number, check number, that is, the checks that you are marking for identification?

MR. BYRNE: Yes, sir.

These purport to be checks of the New York State Teachers' Study Group.

The check numbers are 583, 584.

MR. BERKOWITZ: Will you give the exhibit numbers with those?

MR. BYRNE: All right.

EXAMINER FREDRICKS: We will give them numbers. All right.

No. 583 will be Exhibit BOE 55.

MR. BYRNE: Right.

EXAMINER FREDRICKS: And, if you will identify it by check number and exhibit number each time, I think we will have an accurate identification.

MR. BYRNE: Yes.

Check No. 583 is BOE Exhibit 55.

Check No. 584 is BOE Exhibit 56.

Check No. 586 is BOE Exhibit 57.

Check No. 587 is BOE Exhibit 58.

[Tr. 75]

Check No. 592 is BOE Exhibit 59.

Check No. 593 is BOE Exhibit 60.

Check No. 594 is BOE Exhibit 61.

Check No. 596 is BOE Exhibit 62.

That appears to be a 595. The check is dated
December 17, 1964.

Check No. 596 is BOE Exhibit 63.

Check No. 598 is BOE Exhibit 64.

Check No. 599 is BOE Exhibit 65.

Check No. 600 is BOE Exhibit 66.

Check No. 605 is BOE Exhibit 67.

Check No. 606 is BOE Exhibit 68.

Check No. 607 is BOE Exhibit 69.

Check No. 608 is BOE Exhibit 70.

Check No. 615 is BOE Exhibit 71.

Check No. 618 is BOE Exhibit 72.

Check No. 619 is BOE Exhibit 73.

Check No. 622 is BOE Exhibit 74.

Check 623 is BOE Exhibit 75.

Check No. 624 is BOE Exhibit 76.

Check No. 625 is BOE Exhibit 77.

Check No. 628 is BOE Exhibit 78.

The next check is not numbered. It is dated
February 15, 1965, and it is for \$166. That is BOE Exhibit
79.

[Tr. 76]

Check No. 630 is BOE Exhibit 80.

Check No. 633 is BOE Exhibit 81.

Check No. 634 is BOE Exhibit 82.

Check No. 643 is BOE Exhibit 83.

Check No. 644 is BOE Exhibit 84.

Check No. 645 is BOE Exhibit 85.

Check No. 662 is BOE Exhibit 86.

Check No. 663 is BOE Exhibit 87.

Check No. 663 is BOE Exhibit 88.

Check No. 664 is BOE Exhibit 89.

Check No. 667 is BOE Exhibit 90.

Check No. 678 is BOE Exhibit 91.

Check No. 679 is BOE Exhibit 92.

Check No. 707 is BOE Exhibit 93.

Check No. 712 is BOE Exhibit 94.

Check No. 787 is BOE Exhibit 95.

And finally, check No. 788 is BOE Exhibit 96.

EXAMINER FREDRICKS: Those exhibits are marked as you have indicated for identification.

By Mr. Byrne:

Q Mrs. Friedman, I show you the checks which are marked BOE Exhibits 65 through 96. I ask you to look through these checks and tell me if your signature is on these checks.

A Yes.

[Tr. 77]

Q Yes, you stated.

A Yes, they are my signature.

Q Did you write these checks on or about the date which is indicated on them?

A Well, I would, I assume so.

Q All right, Mrs. Friedman.

To whom did you give these checks?

A To Nelson Travel or Nelson Group Travel Corps.

Q What particular person did you give these checks to?

A To Michael Friedman.

Q Michael Friedman?

A Yes.

Q What position did he have with Nelson Travel Service or Nelson Group Travel Corps?

A He was president of Nelson Group Travel.

Q Now, Mrs. Friedman, there is a notation on the left side of the front of each check.

Would you please explain what the purpose of that notation is on each check, in general?

A Well, it was just to list what the check was for and what it covered.

Q I see.

Now, did you give these checks to Mr. Friedman for the purpose stated on the left-hand side?

[Tr. 78]

A Yes.

Q Of the front of each check?

A Yes, sir.

MR. BYRNE: Mr. Examiner, I offer the checks marked BOE Exhibits 55 through 96 into evidence.

MR. BERKOWITZ: Mr. Examiner, I respectfully submit that I object to the acceptance of those checks into evidence as a group, as it appears from an observation, a mere examination of the checks, that a good many of them, if not most, are irrelevant and immaterial in connection with these proceedings.

For instance, Exhibit 55 for identification is a check to Nelson Travel Service for \$120 and on the left-hand margin the notation is "for 2,000 brochures, 2,000 five-cent stamps."

The next one, 56 is also identified on the left-hand margin for payment of stationery, bill of Aladdin Associates," whatever that means, and so forth.

The next, 57, November 23, \$500, marked "for deposit to World Airways for Japan charter."

The next, BOE 58, for identification, \$235, is marked "11/27/64 for bill of 11/21/64," whatever that means.

There is no showing of any connection or relevancy and so forth and so on.

[Tr. 79]

Without describing each check, I respectfully submit that here you have a mass of material which on the face of it appears to be irrelevant, immaterial and incompetent.

MR. BYRNE: Mr. Examiner, may I try to answer that objection?

EXAMINER FREDRICKS: Yes.

Now, Mrs. Friedman testified that she collected or the study group collected payments from five charters for the summertime of 1965, and that she generally made payment for the charter price to Mr. Friedman, and also that she paid the payments for charter expenses to Mr. Friedman.

Now, presumably, well, she received all these moneys as they came in and she put them into the checking account, and presumably these were not allocated to specific accounts.

So the only reason that I am putting these checks into evidence is to show that she paid the bulk of the moneys that she collected from passengers of these flights to her husband, Mr. Friedman.

So it is necessary to show the entire movement of money, I think, for clarity.

MR. BERKOWITZ: Mr. Examiner, the respondent here is faced with allegations in the complaint. We have taken issue with certain allegations. Those are the issues

[Tr. 80]

before your Honor.

I respectfully submit that these matters involving checks having to do with all sorts of dealings between the teacher study group and Nelson Group Travel are wholly irrelevant with respect to Capitol Airways in the issues set forth in this complaint.

MR. BYRNE: Well, what I am trying to prove, Mr. Examiner, is, first of all, Mrs. Friedman collected money for certain flights that were supposed to occur in the summer of 1965 for the study group, and that the bulk of these moneys that she collected, that she transmitted to Nelson Travel Service and Nelson Group Travel Corp., and that is the only purpose that I am offering these exhibits into evidence for.

MR. BERKOWITZ: Mr. Examiner, I must very strongly object that Capitol is not charged with the inter-company dealings between the teacher study group, Mrs. Friedman, and her husband, Mr. Friedman, the head of Nelson Group Travel.

That would not be binding on us and these checks showing payment on other alleged charters certainly are not relevant to the issues here.

I must object.

EXAMINER FREDRICKS: Mr. Berkowitz, the checks do shed some light on the course of dealing between New York

[Tr. 81]

State Teachers' Study Group and Nelson Travel Service.

It is a little hard to appraise precisely the bearing that has on the issues of fact and law between you and the Bureau of Enforcement.

MR. BERKOWITZ: May I make a suggestion?

EXAMINER FREDRICKS: Yes. Go ahead.

MR. BERKOWITZ: I understand it is difficult at this early stage to see whether or not there is any relevancy and certainly I would not at any time intend to block or make it difficult for proper relevant evidence to be admitted, but may I suggest that the question of whether these checks be accepted in evidence be held in abeyance until there is some proof of relevancy.

Your Honor well understands that in this type of enforcement case, which is punitive in nature, the respondent is entitled to all the safeguards which the law affords in connection with due process, the application of the rules of evidence and the various safeguards which are thus afforded.

I don't mean to be technical, but certainly I think it is my duty on behalf of Capitol to make a proper objection to such evidence which I certainly think is irrelevant.

That's the reason for this.

So in order not to waste time and expedite the

[Tr. 82]

hearing, would you be good enough to reserve on that offer until there is some proof to show the possible relevancy?

EXAMINER FREDRICKS: I will reserve my ruling on the admission of BOE Exhibit 55 through 96 until later in this hearing.

That reservation doesn't imply conviction on my part as to relevancy or not. I will tell you now that I lean a little bit toward admitting them, because it seems to me they round out the background of the transactions that are at issue here, and what I don't see is how they injure Capitol.

MR. BERKOWITZ: We would be very strongly prejudiced if the record were opened to all of the dealings or relationships between Nelson Tour Travel and the Teacher Study Group, especially in this instance where it is a husband-and-wife relationship, and I would imagine and it would seem that the agency had some control over the group itself.

If we are going to open the door to this type of irrelevant type of evidence just because it might perhaps indirectly round something out, then every conversation between the husband and wife and every transaction would thus be admissible, and I respectfully submit that that would be highly improper.

I think the record should be limited to such

[Tr. 83]

evidence which is relevant and material and which would relate to the issues involved in this proceeding, not checks which have to do with payment to World Airways or for World Airways for charter, or some checks which are marked for some Acapulco vacation and things of that nature.

That certainly is not relevant here.

THE WITNESS: Excuse me. That was not a vacation. It was a study group last Easter.

MR. BERKOWITZ: It is not binding on Capitol Airways.

EXAMINER FREDRICKS: Well, Mr. Berkowitz, I am deferring my ruling on that, and we will come to it later.

MR. BERKOWITZ: Later.

By Mr. Byrne:

Q Mrs. Friedman, did you make any checks payable to carriers for flights in the summer of 1965?

A Yes, and there were some to-- on the Easter flight.

Q Well, let's take the summer flights of 1965.

A All right. There was at least one to Capitol.

Q Was there any other payment?

A There was at least one to British Eagle.

MR. BERKOWITZ: I object to any payments other than to Capitol. They are in no way relevant to this

[Tr. 84]

proceeding.

MR. BYRNE: This is just to clarify the situation of the collection of moneys.

MR. BERKOWITZ: Well, it seems to me it just muddies the waters, it clarifies nothing.

It puts in a lot of irrelevant material which is not in issue here.

EXAMINER FREDRICKS: I will permit the question. So far I haven't seen that they go too far afield.

They put in a context for the transactions that we are concerned with.

MR. BYRNE: Mr. Examiner, I have what purports to be a check stub book. I would like to have one page that is set aside in this marked BOE Exhibit 97.

(BOE Exhibit 97 was marked for identification.)

EXAMINER FREDRICKS: That's one page of a check stub?

MR. BYRNE: That's correct.

Q Mrs. Friedman, I show you this page of a stub book that is marked BOE Exhibit 97.

A Um hum.

Q I refer you to the check stub for check No. 792.

A Yes.

Q Does this represent a check that was made out to Capitol Airways?

[Tr. 85]

A Yes.

Q For a charter flight for the summer of 1965?

A Well, it was supposed to be a balance of payments on three charters. They are listed according to the date there.

MR. BERKOWITZ: I object to this unless the check itself is produced.

This is merely an entry in a stub without production of check.

MR. BYRNE: I do not have a copy of this particular check.

MR. BERKOWITZ: This is a self-serving entry, Mr. Examiner.

MR. BYRNE: Mrs. Friedman already testified that she did give a payment to Capitol Airways for a summer flight, 1965, and I just wish to put this check stub into evidence to document this payment.

MR. BERKOWITZ: May I say that Capitol did receive a \$25,000 check. I don't know whether this is the check, and I object to the notations on the stub, but I do concede that Capitol Airways received a check for \$25,000 from the charterer, New York Teachers' Study Group, but I do object to the admission in evidence of those notations on this stub which we never saw and which are not binding on us. I say "us," meaning Capitol Airways.

[Tr. 86]

MR. BYRNE: Well, I would like to offer this page marked BOE Exhibit 97 in evidence for the sole purpose of showing that Mrs. Friedman made payments to Capitol Airways in the amount of \$25,000 for--

MR. BERKOWITZ: Is that the sole purpose of the offer?

MR. BYRNE: Yes, for a summer flight of 1965.

MR. BERKOWITZ: Well, we will concede that Capitol received \$25,000 from the New York State Teachers' Study Group for the July 1, 1965, flight, the only flight involved.

We will concede that. Is that satisfactory?

MR. BYRNE: Yes.

EXAMINER FREDRICKS: For the July 1 flight?

MR. BERKOWITZ: Yes.

MR. BYRNE: Well, that Capitol at least applied this \$25,000 to a flight of July 1st, 1965.

MR. BERKOWITZ: All right. Correct.

EXAMINER FREDRICKS: Well, that would go as stipulated material then?

MR. BERKOWITZ: Yes.

EXAMINER FREDRICKS: And that's in lieu of your offer of BOE Exhibit 97, is that correct, Mr. Byrne?

MR. BYRNE: Yes, Mr. Examiner.

By Mr. Byrne:

Q Now may I ask you, Mrs. Friedman, why did you make

[Tr. 87]

this check payable to Capitol Airways rather than to Nelson Travel Service or Nelson Group Travel Corp.?

A Well, Nelson suggested to do this as a matter of expediency.

Q I see.

What expediency?

MR. BERKOWITZ: I object. Just a moment. I object to any conversation between this witness and somebody else not in the presence of Capitol.

It certainly is not binding on Capitol and I ask that the answer be stricken.

EXAMINER FREDRICKS: All right.

What do you have to say, Mr. Byrne?

MR. BYRNE: Well, Mrs. Friedman testified that the bulk of the payments she received on these five summer flights, she paid the bulk of these payments to Nelson Travel Service or Nelson Group Travel Corp.

Now she testified that she made two checks payable, one to Capitol Airways for \$25,000 and one to British Eagle.

I am just asking here why she made this particular check to Capitol Airways for \$25,000.

MR. BERKOWITZ: He is asking also for the operation of a mind, why, which I respectfully submit immediately indicates that the question is improper.

[Tr. 88]

MR. BYRNE: Well, let me obviate the objection.

Q What facts induced you to make this payment of \$25,000 to Capitol Airways?

MR. BERKOWITZ: Also objected to as highly improper, why should she was induced. The operation of mind is certainly not binding upon Capitol.

I will, perhaps, in order to enlighten Mr. Byrne's burden, refer to the charter agreement itself, which is BOE 1 for identification, charter agreement, which provides at the foot thereof "Make all checks payable to Capitol Airways, Inc."

If that is the reason why she made it to Capitol, that certainly I would accept as a proper answer.

MR. BYRNE: But Mrs. Friedman testified that all payments, except for these two checks to Capitol Airways and British Eagle were made out to Nelson Travel Service and I think it is relevant to ask her why or what facts induced her to make this payment to Capitol Airways.

EXAMINER FREDRICKS: My understanding of her testimony is that Mrs. Friedman said it was expedient to make it to Capitol.

THE WITNESS: Yes, that's correct. However, we made for Easter flights to World Airways. We had made other payments directly.

EXAMINER FREDRICKS: All right. I will let it

[Tr. 89]

stand.

MR. BERKOWITZ: The record will note my objection.

EXAMINER FREDRICKS: It will stand.

Q The check you made to Capitol Airways, to whom did you give this check?

A It was given to Mr. Friedman.

Q Why did you give it to Mr. Friedman?

A Because he said he would have it sent down to Capitol.

MR. BERKOWITZ: I object to any conversation between this witness and Mr. Friedman as not binding on Capitol.

MR. BYRNE: I am asking Mrs. Friedman the purpose, the reason.

EXAMINER FREDRICKS: I will let the answer stand.

Q Now as far as the other charters--

A Yes.

Q --- for the New York State Teachers' Study Group, to whom generally did you make payments for these other charters that were operated?

MR. BERKOWITZ: That is objected to. Not within the issues here concerning other charters what their practice was.

That certainly is not relevant to this proceeding.

[Tr. 90]

MR. BYRNE: I think it is relevant to this proceeding, because we are trying to show an agency relationship between Capitol Airways and the Nelson Travel Service on collection of moneys, and I think a practice is relevant to that point.

EXAMINER FREDRICKS: I don't see how we can ignore the practice, Mr. Berkowitz. Looking at some of the material that's been marked, I have the impression that the practice didn't always conform to that language in the charter agreement.

I think it all bears on what we have to deal with in this case.

Is there a pending question?

(Last question read.)

EXAMINER FREDRICKS: It may be answered.

A Generally they were made to the agent.

Q Who was the agent?

A Nelson Group Travel.

Q Did Capitol Airways operate any charters for the New York State Teachers' Study Group prior--

A Yes.

Q -- to the summer of 1965?

A Yes. They operated three the preceding year.

Q I understand.

To whom did you make payment on these charters?

[Tr. 91]

A To the same, to Nelson Travel Service.

Q To Nelson Travel Service?

A That's correct.

MR. BERKOWITZ: That's objected to. That's not the best evidence.

THE WITNESS: There are records. There are checks.

MR. BERKOWITZ: Well, those records would have to be produced. Otherwise it is the witness's speculation of the case.

THE WITNESS: I would have to have time to obtain them.

MR. BYRNE: We do not have copies of checks for other years. All I am trying to do is show practice on the charters as to whom payment was made by the chartering organization, and I think that her testimony would be admissible for that purpose.

MR. BERKOWITZ: I respectfully submit that the best evidence rule would require the checks themselves, not the recollection of this witness or her surmise of what the case was.

MR. BYRNE: She is not giving it as a surmise. She directly testified.

THE WITNESS: There are checks, there are cancelled checks to prove that.

[Tr. 92]

MR. BERKOWITZ: All the more reason that the witness's testimony be excluded and the checks be produced.

EXAMINER FREDRICKS: I will sustain the objection to the transactions in the previous summer.

MR. BERKOWITZ: I ask the answers be stricken.

EXAMINER FREDRICKS: The answer is stricken.

Q Mrs. Friedman, did you have any personal contact with respect to the flight of July 1, 1965, with Capitol Airways?

A When you say--

Q Any personal contact with any employee of Capitol Airways.

A No, no, I did not.

Q Through whom did you handle all arrangements for this flight?

A Through Nelson Travel.

Q I see.

And now may I ask you what activities did you engage in on behalf of the group with respect to these charter flights?

A Are you referring to meetings specifically for the charter?

Q Yes..

What activities with respect to these charts did you engage in?

[Tr. 93]

A Well, there were specific meetings with information and exchange of information on the charters and what the procedures would be and helpful hints and that kind of thing.

Q Meetings with what persons?

A Meetings with people who had paid to go on the charters.

C I see.

Now this is with respect to the summer flights of 1965?

A Yes, sir.

C Did you make any statements to these people that certain charter flights would be operated during the summer of 1965?

A Yes, sir.

Q What flights did you say to these people would be operated?

MR. BERKOWITZ: Just a moment. That is objected to, statements made by a chartering organization, not an agent, to people having to do with flights, not only, presumably, with Capitol, but with other airlines.

I respectfully submit that would not be binding on Capitol.

Certainly that is purely hearsay so far as we are concerned. I respectfully submit to admission of such

[Tr. 94]

testimony.

MR. BYRNE: I think it is necessary to clear the record on this, because Mrs. Friedman stated that she collected money on various flights for the summer of 1965 and all I am trying to do is ask her what particular flights did she state were going to be operated because people paid money on these flights.

EXAMINER FREDRICKS: I think it is relevant. It may be answered.

MR. BERKOWITZ: It might be relevant if we had the proper testimony which would be admissible as binding on Capitol, but conversations between her and people who were prospective passengers on various flights, flights other than Capitol, certainly such testimony would not be relevant here upon Capitol and purely hearsay, what she said to others not in the presence of anybody in authority from Capitol.

MR. BYRNE: She can state what her conversations with these people were.

MR. BERKOWITZ: I respectfully differ with my learned adversary. That certainly is in violation of the rules of evidence, no matter how liberally we should interpret them.

MR. BYRNE: May I please make a statement.

Several passenger witnesses will testify on behalf

[Tr. 95]

of the Bureau of Enforcement and her statements can be corroborated by these passengers.

MR. BERKOWITZ: That doesn't cure the faultily posed testimony just because later on there may be some additional testimony.

If there is such testimony available, I respectfully submit counsel should introduce the proper testimony at the proper time through the proper witnesses and not through the mouth of this witness.

EXAMINER FREDRICKS: Let us take a 10-minute recess at this time. I will rule on this objection when we come back.

(Recess.)

EXAMINER FREDRICKS: You objected to that question?

MR. BERKOWITZ: Yes. Which people? No names, dates? Where, when?

It is so nebulous, has to do with flights, not Capitol flights in particular.

I respectfully submit it is improper.

MR. BYRNE: There were at least several hundred persons who made payments on these flights as shown by the records of the New York State Teachers' Study Group. So presumably these are the persons that she told that flights would be operated.

I mean people don't pay money towards flights unless

[Tr. 96]

they are told that there is a flight.

MR. BERKOWITZ: Counsel is presuming certain things. We are bound by a certain charter agreement which is marked BOE 1 for identification.

MR. BYRNE: May I state that the only reason I am putting this in is to show that the New York State Teachers' Study Group held out to persons that certain flights would be operated, and that they collected money from these persons.

That is the only reason I am putting these statements into the record.

MR. BERKOWITZ: I have a thought. In other words, the purpose of this testimony is merely to establish a general principle that, generally speaking, the prospective members of various groups were advised that there would be certain flights and that various people paid money.

Is that all?

MR. BYRNE: That is all.

MR. BERKOWITZ: I will take that statement of counsel in lieu of any testimony. The testimony is certainly inadmissible.

EXAMINER FREDRICKS: Does that solve it?

MR. BYRNE: Well, I would like her to state what flights precisely were held out that would be operated,

[Tr. 97]

because I think this matter should be clarified.

EXAMINER FREDRICKS: I see no hurt in this inquiry. The witness may answer the question.

THE WITNESS: You refer only to the Capitol flights or all of them?

Q Well, what flights did you hold out? The five flights, would you please state the dates of each flight and the itinerary of each flight?

A Actually--

MR. BERKOWITZ: Same objection, Mr. Examiner.

EXAMINER FREDRICKS: Same ruling.

A (Continuing) -- the first flight also included our eastern flight to Mexico.

Q Just the summer of 1965.

A Three Capitol flights. Now, if I have the dates correctly, July 1, September 3, Paris, Rome-Paris. Second--

Q Was that from New York, that flight?

A From New York. July 2nd to September-- I am not sure whether it's the 4th. I don't remember the return date; London-Paris from New York.

July, I think it's 4th or 5th-- I don't remember-- returning the early part of September, Rome-Paris.

World Airways charter to Tokyo, July 1st, and a British Eagle flight, a short one leaving approximately

[Tr. 98]

July 19, I believe.

Q I see.

MR. BERKOWITZ: I renew my motion and I ask that this testimony be stricken.

I respectfully submit it is highly prejudicial to Capitol. The witness talks about presumably and so far as she recalls certain dates and the alternative of July 4th or July 5th.

No individual names are mentioned. No dates are stated for these alleged conversations.

Apparently it has to do with flights on other carriers.

I respectfully submit that would be opening the door to all sorts of testimony which is not material here and does not bear upon the issue, and I ask that it be stricken. This is basically hearsay.

EXAMINER FREDRICKS: I will deny the motion to strike.

MR. BERKOWITZ: Exception.

By Mr. Byrne:

Q Mrs. Friedman, did your activities on behalf of the New York State Teachers' Study Group include sending out printed notices?

A Yes. I didn't always send them out, or the study group didn't always send them out, but that was part of

[Tr. 99]

the study group program.

Q Who was responsible for printing up these notices?

A Well, at one time we used to have a mimeograph concern but, when Nelson got a Stetner machine, rexigraphing, printing machine, very often they would do it for the study group and charge us for it.

Q Mrs. Friedman, I show you these documents which are marked BOE Exhibits 26 and 27.

A Um hmm.

Q Were these the type of notices that were sent out by the New York State Teachers' Study Group on the summer flights of 1965?

A Yes. Um hmm.

MR. BYRNE: Mr. Examiner, I offer the documents marked BOE Exhibits 26 and 27 into evidence.

MR. BERKOWITZ: This has to do with the July 1 flight?

MR. BYRNE: Yes. BOE Exhibit 26 has to do with reference to flight No.-- 21 it is called. It says--

MR. BERKOWITZ: 521.

MR. BYRNE: Let's see now.

Oh, yes, departure from New York, Thursday, July 1, 1965.

Now this BOE Exhibit 27 also states a 1:00 o'clock

[Tr. 100]

p.m., No. 2 and 3, Paris-Rome, 7193. That's presumably the July 1, 1965, flight on Capitol Airways.

MR. BERKOWITZ: Well, I will object to Exhibit BOE 27 because that has reference to a flight other than the July 1 flight which is involved.

MR. BYRNE: But it has reference to all five flights that were to be operated in the summer of 1965 for the study group, including July 1, 1965.

MR. BERKOWITZ: I respectfully object to those portions which refer to any flights other than the July 1 flight which is the only one involved in this proceeding.

MR. BYRNE: Mr. Examiner, there was testimony by Mrs. Friedman that she collected money on five flights.

I think it is necessary to establish what these flights were for clarification.

EXAMINER FREDRICKS: Mr. Berkowitz, I am utterly unable to conceive how this material prejudices Capitol.

MR. BERKOWITZ: We are cluttering the record with a lot of material which has no relevancy, and I say in that respect it may prejudice Capitol.

I don't know what else counsel may attempt to introduce and I respectfully submit that we are concerned here with certain issues as set forth in the complaint, and I feel that anything else which is dehors the complaint is

[Tr. 101]

irrelevant and inadmissible and may be prejudicial.

EXAMINER FREDRICKS: Mr. Berkowitz, I can't accept the view that they are prejudicial. The bulk is not a significant amount.

Exhibits BOE 26 and 27 for identification are received in evidence.

(BOE Exhibits 26 and 27 were received in evidence.)

MR. BYRNE: Mr. Examiner, I have no further questions of this witness.

MR. BERKOWITZ: I understand, Mr. Examiner, that I have exceptions even though they are not noted in the record.

EXAMINER FREDRICKS: That's right. Under the Board's rules they are automatic, Mr. Berkowitz.

MR. BERKOWITZ: So that I need not at each time note my exception, which of course has become a matter of habit.

~~CROSS-EXAMINATION~~

By Mr. Berkowitz:

Q. Mrs. Friedman, I show you the copy of the charter agreement which counsel for the Bureau has submitted in this copy form.

MR. BERKOWITZ: You have the original.

Q. (Continuing) I show you the original now which is

[Tr. 102]

BOX Exhibit 1 for identification, and ask you, please, to tell us if that was signed by you. Your name appears on there as Sari Friedman. Is that yours?

A Yes.

Q And you signed that?

A I assume that I did.

Q Well, isn't that your signature?

A Yes.

Q Yes.

A Yes, it appears to be my signature.

Q And when you signed that, was that submitted to you by Nelson Group Travel?

A Yes.

Q By your husband, Mr. Friedman?

A Yes.

Q And you looked at it, did you not, to see what it referred to?

A Yes.

Q You saw it was on the form of Capitol Airways, Inc.?

A Yes.

Q And you saw it related to a flight to depart New York July 1, 1965?

A Yes.

Q And I direct your attention to the notation at the

[Tr. 103]

foot of the first page, "Make all checks payable to Capitol Airways, Inc."

You saw that, did you not?

A I don't think I did. I don't recall seeing-- I couldn't say that I did or didn't. I don't remember seeing that, because the study group always paid agents directly.

MR. BERKOWITZ: I didn't ask you that last, and I ask that it be stricken.

A (Continuing) I don't believe I noticed that the first time.

Q Pardon?

A I really didn't pay any attention to that or read it at the time. That went beyond the price of the charter.

Q Will you please bear with instead of giving me explanations.

A I am sorry.

Q Permit me to ask my questions.

EXAMINER FREDRICKS: That's proper, Mrs.

Friedman. As Mr. Berkowitz asks his questions, just give your answers within the limits of his questions.

THE WITNESS: Yes.

Q (Continuing) I will try to be brief, Mrs.

Friedman. If you don't know, just say so.

[Tr. 104]

You signed a number of charter agreements, did you not?

A I believe so.

Q And you signed these charter agreements on behalf of the New York State Teachers' Study Group?

A Yes.

Q And isn't the reason you made payments in this case to the agent Nelson Group Travel because, amongst other things, your husband, Michael Friedman, was president?

A No.

Q Did you pay any other agents other than Nelson Group Travel?

A Yes.

Q What year was that?

1965 or '64?

A '63 and '64.

Q It was before--

A And also in '65, too.

No. No. I did pay Nelson in '64.

Q Well, when was Nelson Group Travel formed?

A '64.

Q So you couldn't have paid before then because the corporation was non- --

A No, no. Other agents as well.

[Tr. 105]

Q And who formed the corporation of New York State Teachers' Study Group?

A You mean what attorney handled it?

Q Well, wasn't that attended to by your husband, Mr. Friedman?

A Well, I think he knew the attorney or something, but it was done by the study group. There was a meeting and so forth.

Q No, but in going about retaining a lawyer and drawing the papers--

A Well, he brought the information to the attorney, yes.

Q You didn't go to a lawyer yourself?

A I never met him, no, but we had the information and that was all.

Q Would you please just answer my question?

Mrs. Friedman, how long have you been married to Michael Friedman?

A 19 years.

Q Do you have any children?

A No.

Q And there has been a close relationship between you and your husband?

A Yes.

Q And there were times when you assisted your husband

[Tr. 106]

at his office?

A Never.

Q Never been there?

A I was there I think once in 1964 when he took the space and not again till after.

Q Did he ever take any work home with him?

A No.

Q And did he help you with your work in connection with the New York State Teachers' Study Group?

A Not in '65, no.

Q I didn't ask you what year, did I?

A No.

Q Now isn't it true that you solicited through New York State Teachers' Study Group various members of the charter parties, not only for the Capitol Airways flight of July 1, '65, but the four other flights that you testified about?

A Um hum.

Q And you started this solicitation back in the latter part of 1964?

A Um hm. That's right.

Q So that you had enough members of the prospective charter group by the end of 1964 or by the early part of 1965?

A Um hum.

[Tr. 107]

Q Is that correct?

A Yes.

Q So that the problem, therefore, was to find airlines who would have jet aircraft available to carry these charter groups?

A Yes.

Q And in that connection you used the services of your husband who is the president of Nelson Group Travel Corp. because of his greater experience in that field?

A Yes.

Q He had been in the travel agency business for a number of years?

A No.

Q How long had he been in the travel agency business?

A Since 1964, the early part of 1964.

Q So that commencing with the early part of 1964 you had the advantage of having this travel agency headed by your husband who assisted you?

A Yes, sir.

Q In negotiating with, obtaining various airlines who would have jet airplanes to transport these groups, is that correct?

A Jet or non-jet.

Q Or non-jet, depending upon whether or not the

[Tr. 108]

flight was, for instance, to Alcapulco. Did that not require a jet?

A We did have. Yes.

Q You did have.

On November 6, 1964, which is the date of this charter agreement with Capitol, BOE Exhibit 1, this refers to 183 passengers-- and I show it to you-- does it not, 183 passengers?

A Yes.

Q And this contract is dated November 6, 1964?

A Yes.

Q And presumably that is about when you signed it?

A Um hmm.

Q So that at that time you already had these passengers lined up, prepared or set up so that you wanted this airplane to make this trip?

A Well, they had none-- we had members of this group and we assumed that that many want that flight.

Q And you had payments?

A No, we had no payments. We wouldn't accept payments before we had a contract.

Q But you had people signed up?

A No, not until the flight was announced. We never took payment before there was a contract.

Q Yes. There is a contract dated November 6, 1964.

[Tr. 109]

A Yes, but no moneys were received before the--

Q Well, how did you get the number of 183 passengers?

A I think Capitol put that in. Don't they always tell you the configuration, how many people you have to book on the plane?

Q Did you have more than 183 passengers?

A We had the study group.

Q How many did that consist of, the number?

A Close to 3,000 from previous years and so forth.

Q Now, based upon experience, you knew that you would have more than 183 passengers?

A We required it, yes. Sure.

Q Now getting back to what I asked you before, the lawyer who formed the corporation known as New York State Teachers' Study Group--

A Yes.

Q Was the lawyer that was selected by your husband, Mr. Friedman, Michael Friedman?

A He--

Q Yes or no?

A Yes.

Q And you say you never visited this lawyer?

A He was the attorney of previous travel agent--

Q Did you ever visit this lawyer?

A No.

[Tr. 110]

Q He was the lawyer that represented the travel agency which was conducted by your husband?

A No. No.

Q Which travel agency did he represent so far as you know?

A I don't know of any.

Q Did he also represent your husband's travel agency?

A No.

Q Did you say no or you don't know?

A No, I don't think he represented. As far as I know, he didn't.

Q You don't know?

A No, I don't know.

Q Now you said a little while ago you don't recall ever noting this language, "Make all checks payable to Capitol Airways, Inc."?

A Right.

Q Isn't it true that because in this instance the travel agency was headed by your husband?

Do I take it that he was the owner of the corporation, the stock of the corporation?

A Yes.

Q . Therefore you relied upon your husband. You had no hesitancy turning the money over to him?

[Tr. 111]

A Not because he was my husband.

Q Well, is it that you did not rely upon him?

A No, that isn't--

Q Mrs. Friedman--

A I relied on a travel agent.

C Mrs. Friedman, please listen to my question and not volunteer.

When you turned the money over by various checks to the Nelson Group Travel, did you question that these moneys would be paid to the proper parties?

A Yes.

Q You did?

A Well, when you say I questioned--

Q Did you assume that the moneys would be paid?

A That they would be paid.

Q To the proper parties?

A Yes.

Q You had no doubt in your mind?

A No, none whatsoever.

Q You didn't distrust your husband?

A No, not at all.

Q So that he acted as your agent in paying these moneys?

A Right.

Q To various airlines?

[Tr. 112]

A Right. Um hum.

Q And you regarded the Nelson Travel Corporation as the agent for the New York State Teachers' Study Group in receiving the moneys from this group?

MR. BYRNE: I object to this leading question.

MR. BERKOWITZ: This is cross-examination.

MR. BYRNE: He is characterizing this as an agency, calling for a legal conclusion.

MR. BERKOWITZ: I am talking about these acts performed, the payments made.

EXAMINER FREDRICKS: The last question was, you regarded--

MR. BERKOWITZ: I will withdraw that question.

EXAMINER FREDRICKS: All right.

MR. BERKOWITZ: And rephrase it.

Q Mrs. Friedman, during this time while these transactions were taking place, you were a teacher?

A Yes.

Q So that most of your working time was spent in connection with the performance of your duties as a teacher?

A Yes, in school.

Q And you didn't have sufficient time, did you, to negotiate with various airlines and make various inquiries, is that correct?

[Tr. 113]

A That's true, yes.

Q Pardon?

A Yes.

Q You did not have sufficient time?

A No.

Q And, therefore, you were happy to have the services of your husband and Nelson Group Travel Corp. to give you this assistance?

A Yes. Any travel agent.

Q And in having Nelson Travel Group Corporation seek out various airlines who would have airplanes available, these are things that you felt that Nelson Group Travel Corp. knew more about than you did?

A Yes.

Q And that was the business of the travel agent?

A Yes.

Q And when certain airlines were contacted, this was the doing of Mr. Friedman and/or his associates in Nelson Group Travel Corp.?

A Yes.

Q You didn't designate any particular airline?

A No.

Q So that when an airline was contacted and a charter agreement submitted as, for instance, this BOE Exhibit 1, that was as a result of the work and services

[Tr. 114]

performed by Nelson Group Travel Corp. on behalf of the New York State Teachers' Study Group, was it not?

A Yes.

Q And you accepted these services by Nelson Group Travel Corp. as necessarily services which were to be rendered by a travel agent?

A Yes.

Q It would have been rather unusual, would it not, for your study group to go to some strange agent when your husband was in this business?

A No.

Q Did you use any other agent in 1965 other than--

A For a tour, yes, UNITOURS.

Q Well, something which had to do with some additional services?

A Yes.

Q But with ordinary charter flights?

A For 1965, yes. We used--

Q 1965, you solely used the services of Nelson Group Travel Corp.?

A Yes.

Q And did New York State Teachers' Study Group make payment for any services rendered by the Nelson Group Travel Corp.?

A When you say for services rendered, are you referring

[Tr. 115]

to the payments for the charters?

Q For the charters, like the brochures and the--

A When they printed for us, they did any mailing for us.

Q Any other expenditures based on behalf of the study group, such as, for instance, clerical work, secretarial services?

A No.

Q Didn't I see some checks here where these notations were made that these payments were made for services rendered?

A I think there was one there.

Q So there was--

A That was not Nelson's. It was to Olstens, which was a temporary, a part-time employment agency.

Q Were those services rendered in the office of Nelson or your home?

A Where the study group was located.

Q That 2260 Bronx Park East was your home?

A Yes.

Q It was also the home of your husband? You lived together at the time?

A Yes.

Q And didn't you thereafter in having Nelson seek out various airlines, negotiating the pricing and so forth,

[Tr. 116]

were they not doing this on behalf of New York State Teachers' Study Group?

A Yes.

MR. BERKOWITZ: That's all.

MR. BYRNE: I have a question for the witness.

REDIRECT EXAMINATION

By Mr. Byrne:

Q When did you become president of the New York State Teachers' Study Group?

A In November '64.

Q In November '64.

Were you connected with the study group prior to that time?

A Yes, sir.

Q When did you first become a member of the group?

A In 1963, in January. January, 1963.

Q Was the study group in existence prior to that time?

A Yes.

Q I see. What position did you hold in January of '63?

A I don't remember. I think the president at the time, Mr. McArdle, asked me to become treasurer. I think that was.

Q He asked you to become treasurer?

[Tr. 117]

A Yes.

Q And then you became president in November of 1964?

A Yes.

MR. BERKOWITZ: Just one question.

RECROSS-EXAMINATION

By Mr. Berkowitz:

Q In making these various checks which were offered in evidence, 26 through 54 to Nelson Travel Service in various amounts, some had to do with, well, check No. 592, for instance, dated December 7, to Nelson Travel Service, \$1,690.72 -- and I show it to you so you can refresh your recollection-- that had to do with what? What was that payment for?

A That was deposit to Aero Naves for our Easter flight, and there were brochures on the Orient trip and stamps and labels.

Q The amount of that check was how much?

A \$1,690.72.

MR. BERKOWITZ: That's BOE 59, Mr. Examiner.

EXAMINER FREDRICKS: Yes.

Q And BOE 55 to Nelson Travel Service, \$120, what was that for?

A Excuse me. 2,000 brochures and 2,000 5-cent stamps.

Q And BOE 56 for \$82.71, what was that for?

[Tr. 118]

A That was the payment of stationery ordered at Aladdin Associates, on cards, letterheads and so forth.

Q And you paid it through Nelson?

A Yes.

Q BOE 57, Nelson Travel Service, check payable to Nelson Travel Service, \$500, what was that for?

A As deposit to World Airways for our Japan charter.

Q BOE 60, also Nelson Travel Service, payee, \$660, what was that for?

A That was for one night's deposit to the El Prado hotel in Mexico for the-- our Easter group.

Q Now you also made partial payments to Nelson Group Travel--

A Yes.

Q -- did you not, for various flights, trips?

A (Witness nods head.)

Q And, for instance, I show you BOE 62, dated September 17, 1964, a thousand dollars.

What was that for?

A That was a partial payment on the Easter vacation. It was the El Cano Hotel in Acapulco.

Q And in making partial payments, there were a number of such checks, were there not, as for instance, this one, BOE 71, for \$6,000, payable to Nelson Travel Service, and what was that for?

[Tr. 119]

A Additional payments on the Mexican Easter package.

Q Package. So that I take it from this course of conduct, Mrs. Friedman, that you funneled money from New York State Teachers' Study Group to the Nelson Group Travel to pay on behalf of New York State Teachers' Study Group on various flights and for various trips and for various purposes?

A Yes.

Q Therefore, you trusted Nelson Group Travel to act for the state teachers' study group for these various flights and these various matters, correct?

A Yes.

Q And if any loss were to have occurred, it would have been incurred by Nelson Group Travel?

To give you an example, suppose when money was turned over for these matters, placed in a safe in Nelson Group Travel and the money were lost or stolen, who would you consider responsible for that money?

MR. BYRNE: He is asking for a legal conclusion from the witness.

A It never even occurred to me.

EXAMINER FREDRICKS: Isn't it rather hypothetical, Mr. Berkowitz?

MR. BERKOWITZ: Yes. I will withdraw this.

EXAMINER FREDRICKS: I think very possibly the

[Tr. 120]

question didn't occur.

MR. BERKOWITZ: I will withdraw that. She may not know the legal consequences of such a situation, so in all fairness I will withdraw that, but in all fairness let me put this question:

Q As I understood a minute ago, there were many such checks where you turned over money willy-nilly to Nelson Group?

A Not willy-nilly.

MR. BYRNE: That's a characterization.

MR. BERKOWITZ: I will withdraw willy-nilly.

Q Where you turned over various moneys in various amounts to Nelson on behalf of New York State Teachers' Study Group, either to pay the airlines or pay for stationery on account of various trips.

In fact, one check was for a series of trips, was it not, or three trips, you mentioned in your original testimony?

A For three charter flights.

Q And you didn't designate which of the charters should be paid how much?

A No. We assumed it was the same airline.

Q But these were payments on the same account?

A Yes.

Q You are leaving it to Nelson Group Travel to properly

[Tr. 121]

allocate the moneys?

A Yes.

Q On behalf of the New York State Teachers' Study Group?

A Yes.

Q Now you can't show us here, can you, Mrs. Friedman, that for the July 1, 1965, flight, there were checks from the New York State Teachers' Study Group to Nelson totaling \$52,331, the amount set forth in this Capitol Airways Charter agreement, BOE Exhibit 1?

Is that the amount?

A Yes, that's the amount, but all the checks showed three flights. We allocated the three flights, so much on each.

Q How many charter agreements on behalf of the New York State Teachers' Study Group sign with Capitol Airways?

A I think there were three.

Q Will you produce them, please?

A I don't have them. I saw them.

Q Did you keep a copy?

A I didn't keep a copy.

Q Who produced those charter agreements?

A Nelson Travel.

Q Pardon?

[Tr. 122]

A Nelson Travel. It was the same form as that.

Q Do you know when these forms were produced?

A I don't remember the exact months, but within a few months' time.

Q Do you know which airlines?

A Capitol.

Q Did you on behalf of New York State Teachers' Study Group retain a copy of such an agreement?

A Yes, but I think the District Attorney's office has them, any of the records.

MR. BERKOWITZ: I call upon counsel for the Bureau to produce any other agreements, if there are any.

We submit there are no such.

MR. BYRNE: We didn't make a claim of any other agreements.

THE WITNESS: Well, the District Attorney's office has them.

MR. BERKOWITZ: I ask that be stricken and I submit there are no such other agreements.

EXAMINER FREDRICKS: You are moving to strike what?

MR. BERKOWITZ: The testimony of this witness that there are certain agreements which are not produced. I submit there are no such agreements.

EXAMINER FREDRICKS: Wasn't the witness's statement

[Tr. 123]

elicited by your question?

MR. BERKOWITZ: It is a voluntary statement. I elicited, I asked if there were other forms produced, but I also submit there are no such forms, and I submit the witness's gratuitous statement that there are is incompetent and irrelevant and should be stricken.

MR. BYRNE: Again I repeat there were no other agreements for other flights.

All we tried to show from Mrs. Friedman was that she collected money for five flights in the summer of 1965, and these flights were advertised. That is all.

We did not claim that Capitol entered into any agreement for any flight other than July 1, 1965, and there was no written contract for any other flight.

We are not claiming that there were any other contracts.

EXAMINER FREDRICKS: All right. I will strike the testimony as to other flights with Capitol in the summer of 1965 than the July 1 charter flight that is at issue here.

MR. BERKOWITZ: Yes.

By Mr. Berkowitz:

Q In order to clarify this, so far as the witness is concerned, what you understood about flights was told to you by your husband?

[Tr. 124]

A I saw forms just like that. I did. I am sorry. I have to tell the truth.

Q Well, you saw forms. You can't tell me what's on the form. You can't tell me this notation was on the form either (indicating)?

A All I can say, I saw the form. The District Attorney has the form.

MR. BYRNE: Mr. Examiner, we have already stated that we are not contending that there were any contracts for the July 5 or July 4 flight.

So we think that should be stopped.

MR. BERKOWITZ: I ask that be stricken.

EXAMINER FREDRICKS: Well, we will let the record stand on that.

Q These various checks that were submitted here, Mrs. Friedman, can you select for us, please, checks payable to Nelson Group Travel which are marked, and of which some would indicate that they are for the July 1, 1965 flight and totaling it all, \$52,331?

A Well, there would be portions of several checks, because each one was marked for three flights.

MR. BYRNE: May I state the notation on each check was marked, the purpose for what each one is, and I think that stands on the record, the amount she allocated on each check towards what charter.

[Tr. 125]

It would take a detailed study, I mean a study of the checks.

MR. BERKOWITZ: Yes. I realize that.

EXAMINER FREDRICKS: I don't think it is necessary to ask the witness to do that.

MR. BERKOWITZ: I suppose she can.

EXAMINER FREDRICKS: It is available to each party.

MR. BERKOWITZ: We have attempted to make such a computation here after these checks, copies, were presented to us and all we can find which might be referable to this July 1 flight, 1965, is \$20,933.

MR. BYRNE: Well, I don't think that's admissible in evidence, that statement.

MR. BERKOWITZ: No, this is merely by way of information.

MR. BYRNE: Because that would have to do with the study.

MR. BERKOWITZ: I have no further questions.

EXAMINER FREDRICKS: If there is nothing further--

MR. BYRNE: I would like to ask one more question of the witness, if I may.

EXAMINER FREDRICKS: Very well.

REDIRECT EXAMINATION

By Mr. Byrne:

[Tr. 126]

Q Mrs. Friedman, did you transmit all the payments you received from passengers on these five summer flights for 1965` either to Nelson Travel Service or to British Eagle Airways or to Capitol?

A Oh, yes, sir, certainly.

MR. BYRNE: There are no further questions, Mr. Byrne.

EXAMINER FREDRICKS:)There being nothing further, Mrs. Friedman/ is excused.

Let us take a recess at this time until two o'clock, when we will resume in this room this afternoon.

(Whereupon, a recess for lunch was taken until 2:00 p.m.)

[Tr. 127]

AFTERNOON SESSION

EXAMINER FREDRICKS: Let us come to order.

MR. BYRNE: Mr. Examiner, at this time I would like to call Mr. Michael Friedman to the stand.

EXAMINER FREDRICKS: Very well.

Whereupon,

MICHAEL S. FRIEDMAN,
was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q Mr. Friedman, will you please state your name for the record?

A Yes. Michael S. Friedman.

Q Mr. Friedman, did you ever have any connection with Nelson Travel Service and Nelson Group Travel Corporation?

A Yes.

Q Would you please explain what your connection was?

A I was the principal stockholder and president of Nelson Group Travel. I was the sole owner of Nelson Travel Service.

MR. BERKOWITZ: Sorry. Sole owner of what?

THE WITNESS: Nelson Travel Service, I was the sole

[Tr. 128]

owner, and Nelson Travel Corporation, I was the president and principal stockholder.

Q When did Nelson Travel Service begin operation as a business?

A I would say roughly at the beginning of 1964. I don't know the exact date.

Q And when was Nelson Group Travel Corp. incorporated?

A I think we incorporated towards the latter part of '64.

Q I see.

Now what business did Nelson Travel and Nelson Group Travel Corporation carry on?

A Principally with group travel to different areas of the world.

Q I see.

And did you ever arrange any charters with various carriers?

A Yes, we did.

Q And did you ever arrange any charters with Capitol Airways?

A Yes, I did.

Q Now taking the time prior to the summer of 1965, what charters did you operate with Capitol Airways?

A I operated three charters, flights to Europe for the New York State Teachers' Study Group.

[Tr. 129]

Q When was that?

A That was in the summer of '64.

Q Were these the only other charters that you ever acted as agent on?

A That's correct-- no. In '64, yes. In '64 it was just for the New York State Teachers' Study Group.

Q Did you operate as agent for any other Capitol charters prior to the summer of '65?

A No.

Q I see.

What did you do in connection with these charters?

A I would arrange for the aircraft with the airline. I would fill out the necessary CAB forms, help the group director, set up the program of how he would receive the money from his people and I would prepare, of course, the manifest and all the other paper work that was necessary.

Q Now when you were arranging charters with Capitol Airways, what person did you deal with in Capitol on a person-to-person basis?

A Well, in 1964 I worked with Mr. Warren Clark, who is now deceased, and his secretary, and in 1965 with Mr. Daniel Mitchell or Mr. Walter Schofield, and on several occasions I spoke and worked with Mr. Mansfield.

Q I see.

Whom did you principally deal with in Capitol

[Tr. 130]

Airways after Mr. Clark died?

A Mr. Mitchell, his successor.

Q Did you arrange with Capitol Airways for a charter flight on July 1, 1965?

A Yes, I did, sir.

Q For New York State Teachers' Study Group?

A Yes, I did.

Q Who was in charge of charter arrangements within the study group?

A Mrs. Friedman.

Q Is she your wife?

A Yes, sir.

Q Did Nelson Travel Service enter into any agency agreement with Capitol on the July 1, 1965, charter?

A Yes, sir, we did.

Q Now did Nelson Travel Service make any arrangements for any other charters with Capitol Airways for the summer of 1965?

A Not for the summer-- yes, actually I entered into a contract agreement, had the agency agreement for several other groups.

I had an agency agreement with a group called the professional teachers.

I had one prepared for the United Federation of Teachers.

[Tr. 131]

I had one for another group called the Sound and Light, and there were a number of others.

Q When were these charters supposed to be operated?

A Some were for the summer period, and some were supposed to be for Easter.

Q This was '65?

A '65, yes.

Q Did you enter into any arrangement with Capitol Airways with any charter for the New York State Teachers' Study Group besides the July 1, 1965 charter?

A Yes, there were two other charter flights involved. There were three we got involved in for the New York State Teachers' Study Group.

Q This is during the summer of 1965?

A '65.

Q Were there any contracts executed on these flights?

A There were three contracts scheduled--

MR. BERKOWITZ: Objected to unless the contracts are produced. The witness's testimony as to what contracts were entered into, I respectfully submit, would be improper.

The best-evidence rule would require the production of the contracts as setting forth the terms and conditions therein.

[Tr. 132]

Q Mr. Friedman, I show you this contract that is marked BOE Exhibit 1, which is in evidence.

Is this a contract for the New York State Teachers' Study Group?

A Yes, it is.

Q For the July 1, 1965 charter?

A That's correct.

Q Were there any other contracts executed for the New York State Teachers' Study Group flight?

A There were two other contracts.

MR. BERKOWITZ: That's objected to, and I ask that be stricken unless the contracts are produced.

EXAMINER FREDRICKS: There is an objection to it.

MR. BYRNE: I understand, but I am just asking him if from his information that there were any contracts that were executed besides this one for July 1, 1965.

EXAMINER FREDRICKS: Well, as I understand it, that's what Mr. Berkowitz objects to.

MR. BERKOWITZ: That's not in issue here.

The complaint alleges merely the July 1, 1965 contract.

Q Well, did you enter into any other type? Did you speak with Capitol Airways or the representative of Capitol Airways concerning flights for the New York State Teacher's

[Tr. 133]

Group on dates other than July 1, 1965?

A Yes. Yes.

Q This was for the period--

A For the 1965.

Q The summer of 1965?

A Summer. Correct.

Q Did Capitol make any commitments of any type?

MR. BERKOWITZ: That's objected to. It calls for a conclusion.

Q You said you discussed these flights, flights besides this July 1, 1965 charter?

A Absolutely.

Q Whom did you discuss this with?

A Mr. Mitchell.

Q Now, Mr. Friedman, who was in charge of collecting money from passengers on the New York State Teachers' Study Group charters in the summer of 1965?

A The New York State Teachers' Study Group.

Q What person was in charge?

A Well, it was my wife, Mrs. Friedman, and there were two other people helping her.

Q Mr. Friedman, I have here a series of checks which are marked BOE Exhibits 55 to 96.

I ask you to look at these checks and tell me if you received these checks from Mrs. Friedman.

[Tr. 134]

A Yes.

Q Did you endorse those checks on the back?

A Well, either I endorsed it myself or my bookkeeper in the office did.

I see.

Where were these checks deposited?

A Well, we had, in our bank of course, in Westchester; we had the First Westchester National Bank and the National Bank of Westchester, and then at a later date we had the County Trust Company-- the County Trust Company, yes.

Q Did Nelson Travel Service and Nelson Group Travel have separate checking accounts?

A Yes.

MR. BYRNE: Mr. Examiner, I have here two checks which I would like to be marked BOE Exhibits 97 and 98.

EXAMINER FREDRICKS: Very well.

Can you identify them one from the other?

MR. BYRNE: Yes. These checks are on the account of Nelson Travel Service.

One is check No. 542 and one is No. 662.

MR. BERKOWITZ: Mr. Byrne, I think BOE 97 is the page or the stub of the check book.

MR. BYRNE: I think that was withdrawn, Mr. Berkowitz. I think you admitted that payment of \$25,000 was received.

[Tr. 135]

MR. BERKOWITZ: That's right, that was withdrawn, Mr. Examiner.

EXAMINER FREDRICKS: Yes. It was marked as BOE Exhibit 97 for identification, however.

So let's mark these 98 and 99.

(BOE Exhibits Nos. 98 and 99 were marked for identification.)

Q Mr. Friedman, I show you these two checks which are marked BOE Exhibits 98 and 99.

Is your signature on these checks?

A Yes. Yes, they are.

Q Were these signed on or about the date which is stated on these checks?

A I would assume they were signed on the date they were dated, yes.

Q To whom did you give these checks?

A I think--I am sure I gave them to Capitol. Whether I mailed them or gave it to them personally, I really don't know.

Q I see.

But you gave them to Capitol Airways, either by mailing them or personally giving them?

A Yes.

Q I see.

For what purpose? What were these checks in payment

[Tr. 136]

for?

A Well, they are both marked for payment on the July 1 to September 3 flights.

Q I see.

A For the New York State Teachers.

Q And this check which is marked BOE Exhibit 98?

A Well, for deposit, New York State Teachers' Study Group, charter flights from July 1.

Q This would refer to a summer flight for the study group?

A That's correct.

MR. BYRNE: Mr.Examiner, I offer the checks marked BOE Exhibits 98 and 99 into evidence.

EXAMINER FREDRICKS: They are received in evidence.

(BOE Exhibits 98 and 99 were received in evidence.)

Q Now, Mr.Friedman, I show you this check marked BOE Exhibit 12.

This is already in evidence, and I ask you if your signature appears on this check.

A That's my signature, yes.

Q Did you sign that check on or about the date which appears thereon?

A Yes.

[Tr. 137]

Q To whom did you make this check payable?

A Capitol Airways.

Did you give this check personally to any Capitol employee or did you mail this check in?

Well, did you send--

I believe I gave this to Mr. Mitchell when he was in my office.

Q Now this check is marked "payment stopped".

A That's right.

Q Did you stop payment on this check?

A I stopped payment on this check.

Q What was the reason for stopping payment on this check?

A I didn't have funds to cover it and it would go back collect and I would rather stop payment on it.

Q Thank you.

Mr. Friedman, did you transmit to Capitol a check in the sum of \$25,000, which had been written on the funds of the New York State Teachers' Study Group?

A Yes.

Q Was this payment for the July 1, 1965 charter?

A Yes.

Q Did you make any other payments to Capitol Airways for this flight of July 1, 1965, besides the checks we have just discussed?

[Tr. 138]

A Well, yes, there were payments made for deposit on other flights, on other flights other than for the New York State Teachers' Study Group, which were to be applied, when I cancelled these flights out they were to be applied for the New York State Teachers' Study Group.

Q Would you please explain that?

A In other words, if I had \$5,000 on deposit for another flight other than the New York State Teachers' Study Group and I cancelled the flight with Capitol, the \$5,000 that was on deposit with Capitol would have been applied to the New York State Teachers' Study Group flight, in addition to the payments I received for any other flights.

Q Were these in addition to any payments made for the July 1, 1965 flight?

A Directly, yes.

MR. BYRNE: Mr. Examiner, I would like to have the following five checks marked as BOE Exhibits 100 through 104.

(BOE Exhibits 100 through 104 were marked for identification.)

Q Mr. Friedman, I show you these checks which were marked BOE Exhibits 100 through 104. Will you please look at these checks?

[Tr. 139]

Well, first of all, that specifically states the check marked BOE Exhibit 100.

MR. BERKOWITZ: BOE 100, Mr. Byrne, is which one?

MR. BYRNE: That's check No. 639.

Q (Continuing) Does your signature appear on this check?

A Yes, it does.

Q Now BOE Exhibits 103 and 104, does your signature appear on those checks?

A Yes, they do.

Q Did you sign these checks on or about the date which appears on them?

A Yes.

Q To whom did you give these checks?

A These checks were given to Mr. Mitchell.

Q Now I show you the checks which are marked BOE Exhibits 101 and 102.

Whose signature appears on those checks?

A That was my secretary's, Miss-- Mrs. Joanne Floyd, who had power to sign my checks.

Q Did you tell her to sign these two checks?

A Yes.

Q Were these signed--

EXAMINER FREDRICKS: Which checks?

[Tr. 140]

MR. BYRNE: I am sorry, Mr. Examiner.

These are the checks marked BOE Exhibits 102 and 101.

(Continuing) Were these signed on or about the date which appears on them?

A I would say so, yes.

Q Did you give these checks to Daniel Mitchell?

A They were given or they were mailed. I don't recall, but they were given to Daniel Mitchell.

Q Now I refer you to BOE Exhibit 104.

That's check No. 380.

Would you please explain the notation on the left-hand side of the front of that check?

A Yes.

It says 'replacement for check 821, nat--"NTS."
I don't know what that stands for.

Q Would that stand for Nelson Travel Service?

A That's right.

The check for \$3,000 was originally drawn on Nelson Travel Service and apparently had been returned.

Apparently there wasn't enough money in that account and it was reissued on Nelson Group Travel Corporation.

MR. BYRNE: I see.

Mr. Examiner, I have a check stub book. I would like to have a certain page marked BOE Exhibit 105. I do not

[Tr. 141]

have a copy of this check stub for the parties.

EXAMINER FREDRICKS: Yes, it will be so marked for identification.

Will you mark it physically?

(BOE Exhibit 105 was marked for identification.)

Q Now, Mr. Friedman, I refer you to the check stub on BOE Exhibit 105, a check stub No. 821.

Did this check, which is marked BOE 104, replace this check?

A Yes, it did.

Q Now, Mr. Friedman, would you please tell us for what purpose you gave these checks to Mr. Mitchell?

A Well, actually they were for, ostensibly as a loan and the checks were marked.

All I think but one or two are marked that way, but--

Q There are several checks marked "loan."

A Yes, but technically I guess and literally they were for services rendered and to be rendered.

Q What services were these?

A Well, we were working very closely with Capitol Airways toward getting a great deal of flights going down, right to the Caribbean area.

Q I see.

A And of course, the success of such a program would

[Tr. 142]

depend largely upon availability of aircraft, and Capitol would help us a great deal if we worked together.

And we worked, we were working on a very large program of getting a number of flights going down to the Caribbean area.

Q You gave these checks, coming to the total of \$5,000, to Daniel Mitchell, to him personally?

A Yes.

Q For his personal account?

A Yes.

Q You gave these checks to him.

What particular services did Mr. Mitchell perform to merit the receipt of these?

A Well, Mr. Mitchell was the manager of the New York office.

Q Now what service did Daniel Mitchell perform for Nelson Travel Service, or Nelson Group Travel Corporation that you gave him the sum of \$5,000?

A Well, he didn't perform any services per se. It was for services that probably might be performed in the future, just to build a close relationship between the office of Capitol Airways and Nelson Group Travel.

Q I see.

Did you have any other financial arrangements with Daniel Mitchell?

[Tr. 143]

A Well, we discussed with my attorney, Mr. Robert A. Fredman in New Rochelle, New York, whether Mr. Mitchell and Mr. Mansfield would participate in Nelson Group Travel as far as on the stock arrangement was concerned, and also at that time I was negotiating with a travel agency called Gail Travel in New York City, where I was to buy Gail Travel, and Mr. Mitchell and Mr. Mansfield could also participate in that stock participation, and they would be, Mr. Mansfield would not be named by name and Mr. Mitchell would be named by name, but they would own the-- 10 per cent of the stock I think is what we considered.

Q Now you said that Mr. Mitchell and Mr. Mansfield--

A That's correct.

Q -- were to obtain--

A Although I never discussed this with Mr. Mansfield directly. Mr. Mitchell told me he was acting on behalf of Mr. Mansfield and himself.

Q Now what was the stock interest which Mr. Mitchell was supposed to receive?

A They would own 10 per cent of Nelson Group Travel Corporation and 10 per cent of the Gail Travel Service when I would buy that.

Q You offered this stock interest?

A Yes.

Q Did they take this stock interest?

[Tr. 144]

A It reached the point where my attorney, Mr. Robert A. Freeman, in New Rochelle, drew up the papers, but it was never consummated.

These, these papers were drawn up in front of my attorney, Mr. Freeman.

Q When did this transaction occur?

A I can't pinpoint the exact date, but I would say approximately March, possibly March of '65.

Q Did any other persons besides yourself hold any stock interest in Nelson Group Travel Corporation?

A Yes, there were two partners.

Q Who were they?

A Two additional stockholders.

Q Who were these?

A Mr. Donald Schorr, D-o-n-n-a-l-d Schorr, S-c-h-o-r-r, who owned 10 per cent of the stock, and Mrs. Patrician Flanagan, F-l-a-n-a-g-a-n, owned 10 per cent of the stock.

Q What were the circumstances under which she obtained 10 per cent stock interest in Nelson Group Travel Corporation?

A I gave her 10 per cent of the stock. She was working for me. She was my vice-president, and I gave her 10 per cent of the stock.

Q Did you ever discuss giving a stock interest in

[Tr. 145]

Nelson Group Travel Corp. to Patricia Flanagan in the presence of Mr. Daniel Mitchell?

A Oh, yes.

Q Why did you discuss this matter with him?

A Actually I came to know Mrs. Flanagan by virute of the fact that she worked for an agency in Canada, Tropical Holidays, which had a very similar operation to Jamaica-- and-- not a similar. At that time I wasn't working any trips to Jamaica at all.

And Mr. Mansfield introduced me to Mr. Gregory who was the president of Tropical Holidays and at that time Mrs. Flanagan's was his vice-president in Canada.

And Mr. Mansfield arranged for me to meet Mrs. Flanagan here in New York and I became the North American agent for Tropical Holidays and then when Tropical Holidays went defunct, I hired Mrs. Flanagan to work for Nelson Group Travel.

Q I see.

A But Mr. Mansfield thought that she would be a decided asset to the corporation and I believe-- I don't know if they flew any flights with Capitol, but they certainly were well known to one another.

Q Were you a personal friend of Mr. Daniel Mitchell?

A I think we were personal friends as well as business associates, yes.

[Tr. 146]

Q Did you have many social contacts with Mr. Mitchell?

A Oh, yes. Yes.

Q Now you stated that prior to the summer of 1965 you acted as agent on other charters--

A That's right.

Q -- for Capitol Airways.

Who made payment on these charters?

A I made payment to Capitol Airways for the study group.

Q From the funds of Nelson Travel Service or Nelson Group Travel Corporation?

A Yes, exactly the same way, yes.

Q Was it your practice in dealing with charters on Capitol Airways for Nelson Travel Service to make payment?

A Well, sure.

Q To the carrier?

A Sure.

Q Rather than to any other organization?

A Yes.

As a matter of fact, on one occasion we discussed the pros and cons of this, and I was given to understand that they require it directly from the group only, where they don't know the agent, but where they know the agent is perfectly all right to pay through them for the group.

[Tr. 147]

Q Who told you that?

A Mr. Schofield and Mr. Mitchell.

Q Were there any criminal proceedings brought against you in the summer of 1965?

A Yes.

Q What criminal proceedings exactly were brought against you?

A I was indicted on grand larceny in the first degree. I pleaded guilty to grand larceny in the second degree and I am currently serving a sentence in state prison.

MR. BYRNE: I have no further questions of this witness at this time, Mr. Examiner.

CROSS-EXAMINATION

By Mr. Berkowitz:

Q Mr. Friedman, you are the husband of the previous witness, Sari Friedman?

A I most certainly am.

Q And these checks which you testified about, which were marked loans, totaling \$5,000 to Daniel Mitchell, do I understand you correctly, that the reason why you made these loans to Mr. Mitchell personally is because you thought he could help you in getting you suitable dates from Capitol Airways when certain aircraft would be available for charter flights?

[Tr. 148]

Let me put it this way: It would be to your benefit to have a friend in Capitol Airways so that you might thus get preferential treatment so far as the availability of aircraft?

A Mr. Berkowitz, I can't answer that in a yes or no answer. May I go beyond that yes or no?

Q Well, no, let me try to phrase it my way, please.

These were not bribes to Mr. Mitchell so that Nelson Group Travel would obtain some unfair, improper, unlawful advantage of Capitol Airways, was it?

Yes or no?

A You will have to ask me the question again. I am sorry.

Q These checks totaling \$5,000 were marked loans, were they not, and you anticipated that eventually \$5,000 would be paid back, would it not?

A No.

Q You did not? Well, did you at one time tell me that at one time you had loaned a small sum to Mr. Clark, the predecessor of Mr. Mitchell, and Mr. Clark repaid it and sent you a letter, thanking you?

A In the sum of \$10, yes, sir.

Q However, it was a loan, was it not?

A We went to the airport and he needed \$10.

Q Will you be good enough to listen to my question?

[Tr. 149]

Either answer my question or, if you don't understand it, please say so.

A Right.

Q Now your testimony--and I listened to it-- you said the important thing was in order to have a successful business or words to that effect, to have the availability of aircraft, isn't that so?

A Yes, it's one of the reasons, one of the points.

Q One of the main factors in order to have a successful travel agency operation, to have aircraft available, isn't that correct?

A Yes.

Q And you know that Mr. Mitchell was the sales director in the New York area, is that right?

A Yes.

Q And Capitol Airways had its offices and principal place of business in Nashville?

A Right.

Q So that the New York office with respect to sales was under the guidance of Mr. Daniel Mitchell?

A Right.

Q And, therefore, Mr. Mitchell would be the person who would arrange for the sales of charter flights in this area, the New York area, isn't that correct?

A Right.

[Tr. 150]

Q And, therefore, it would be helpful to you if Mr. Mitchell, as between you, Nelson Group Travel and another competing travel agent where both travel agents would want an aircraft on the same date, if he were to prefer to want your company, isn't that correct?

A Yes.

Q And, therefore, it was to your benefit to be friendly with Mr. Mitchell, isn't that right?

A Yes.

Q And in order to further your friendship at a time when Mr. Mitchell had some personal financial difficulty, you agreed to make a loan to Mr. Mitchell, isn't that correct?

A Right.

Q And these checks which were introduced in evidence were these moneys which you advanced on this loan, isn't that correct?

A Well, you are using--

Q Yes or no?

A No.

Q You testified a minute ago that Mr. Mitchell had some personal financial problems.

A Right.

Q And he needed some money by way of loan and he approached you for a loan and you helped him out, did you not?

[Tr. 151]

A Right.

Q Now this was not a secret off-the-record payment by cash to Mr. Mitchell for his favor, was it?

A Not this particular transaction.

Q We are talking about this transaction.

Please limit it to this transaction.

Did you think at this time when these checks were advanced to Mr. Mitchell that it was a proper type of arrangement, or did you think it was improper?

A Improper.

Q It was improper, and what was your motive in doing this thing which you thought was improper?

A What was my motive?

Q Yes.

A We had worked out an arrangement where I would give Capitol Airways, the people in Capitol Airways, that helped me get a flight or a charter flight, \$500 commission per flight.

In addition, I was to be given various contracts when people came in for charter flights and there was no agent of record, I would be made the agent and given the five per cent commission.

Q On these flights?

A I was also, if I may continue, I was also told at that time that when people came in requesting charter, planes

[Tr. 152]

for charter flights that they had in mind, they would be referred to me, and in this instance I was given various leads.

Q Now these flights which you say came in to Capitol, I presume you mean the New York office, in which there was no agent; am I correct then from your testimony that the arrangement then was that your name or your company's name would be put down as the agent on those flights?

A That's correct.

Q So that your company would then get a commission to which it was not entitled?

A That's correct.

Q Would this be stealing from Capitol?

A No; not as far as I know. Not if the regional manager names me the agent.

Q Well, if in this case, in such an instance, no agent was to get a commission, but the entire charter price paid to Capitol by virtue of having your company's name put in the contract as agent, wouldn't this deprive Capitol of the amount of money or dollars which were to be paid as commission?

A I don't think so, because the CAB ruling as I interpreted it was that in the case of a supplemental carrier such as Capitol, Saturn or one of the others, that it wasn't required for the agent to be given the commission. Anybody on

[Tr. 153]

the flight could be given the commission, and somebody would have been given the five per cent anyway.

Q Well, who would have been given the five per cent if your company had not been put down as agent?

A I would say the group leader perhaps.

Q You say the group leader, perhaps?

A I don't know. It would be of their own choosing.

Q Is it possible there would be no commission paid?

A I don't think there's a flight that goes off without the commission being paid. At least I have--

Q Well, the fact your name was put down and you thus had a commission on a flight with which you had no connection, didn't that deprive some other agent of a commission, or a group leader?

A Yes.

Q Would that be stealing from this other agent or group leader?

A I don't know. Unless I did some of the work involved like preparing a manifest. That's the only work involved in working for a charter flight.

Q Were there any such flights where your name or the name of Nelson Group Travel was put down on a charter which was handled through the New York Capitol office where your company actually received commissions when in fact you

[Tr. 154]

were not the real agent?

A We didn't receive the commissions. That's just the trouble. We did not receive the commissions, but we took agreements, one the professional teachers and the other was the Light and Sound or Sound and Light, I believe.

Q Those two groups that you mentioned were not customers of Nelson?

A That's correct.

Q But these were so-called house accounts or house charters?

A I assume they were.

Q And the name of Nelson Group Travel was put down as the agent?

A That's correct.

Q By whom?

A I was sent a copy of the agency agreement which I signed.

Q Sent by whom?

A By Mr. Mitchell of Capitol Airways.

Q And you knew nothing about these flights when you got these agreements?

A I knew nothing about these flights.

Q And when you received these papers in the mail you signed them and then returned them?

A Yes. I think I got a copy in my files. I am sure of

[Tr. 155]

it.

Q Do you know when these flights took place?

A One was to take place last summer and one I believe early in the year.

Q Do you know whether those flights took place?

A I know one did. The Light and Sound or Sound and Light. I don't believe the professional teachers does.

Q The Sound and Light or Light and Sound, whichever one you say, do you know where that charter was to?

A I believe it was to Puerto Rico. I am not sure.

Q Do you know what type of equipment was to be used?

A A Super-Constellation.

Q Do you know what the amount of the commission was?

A I don't recall what it was, to Puerto Rico.

Q Did you in fact render any services on that flight?

A No, none at all.

Q So whatever arrangement might have been or whatever discussion might have taken place, the fact is that this scheme was never carried out?

A That's correct.

Q You never got 10 cents?

A Not a dime.

Q No money at all?

[Tr. 156]

A Nothing.

Q All right, then.

To get back to what you testified previously, you say that the proposed deal that was handled by your lawyer, Robert A. Friedman-- incidentally, where is he located?

A It's Freeman, F-r-e-e-m-a-n.

Q I beg your pardon, where is he located?

A 271 North Avenue in New Rochelle.

Q And this was a proposed arrangement whereby Messrs. Mansfield and Mitchell would participate to the extent of each getting 10 per cent of the stock of Nelson Group Travel?

A Not each. I am sorry. It's collectively 10 per cent.

Q Collectively 10 per cent, and you say you had no discussions with Mr. Mansfield but you had the assurance of Mr. Mitchell that he was acting for both Mr. Mansfield and himself, but you knew Mr. Mansfield, did you not?

A Very well.

Q And had known him for quite some time?

A Quite some time.

Q And you spoke to him very often on the telephone?

A Very frequently.

[Tr. 157]

Q Well, were there any occasions when you spoke to Mr. Mansfield on the telephone subsequent to the time when Mr. Mitchell told you he was acting for both?

A Never did. I felt the phone was an improper way of handling this.

Q Well, did you feel that this was an unlawful arrangement?

A Not unlawful but certainly in bad taste.

Q Bad taste?

A Obviously.

Q And you think there might have been a conflict of interest on the part of Messrs. Mitchell and Mansfield to participate secretly in the agency of your corporation when they were employed at the same time by Capitol Airways?

A I think it would have been bad taste again.

Q Aside from this, wouldn't it give rise to a conflict of interest?

A On their part, yes.

Q There would be certain loyalties which they owed to Capitol Airways?

A They would be subjugated.

Q And then loyalties which they owed to your travel agency?

A That's correct.

[Tr. 158]

Q Was part of these negotiations with Mr. Mansfield and Mitchell to put up any money for this 10 per cent interest?

A No.

Q So this was going to be a gift?

A A gift.

Q And the purpose of this gift was, therefore, on your part to get some preferred treatment from Messrs. Mitchell and Mansfield in the transactions between Captiol Airways and Nelson Group Travel?

A That's correct.

Q Now Nelson Group Travel, was, as you put it, a group type of agency where you operated in the nature of a wholesale business?

A Not wholesale, but we didn't deal in the single-ticket operation. It was only sole entity groups.

Q So you didn't concern yourself with individually ticketed passengers?

A That's correct.

Q That was not within the business arrangements of Nelson Group Travel.

Well, didn't you feel that making such an arrangement or proposing such arrangement that was never carried out, that this was in the nature of a bribe?

MR. BYRNE: That calls for a legal conclusion, Mr.

[Tr. 159]

Examiner.

EXAMINER FREDRICKS: I will allow the question.

A I didn't consider it a bribe at all. I thought it was a gratuity.

Q Well, you didn't want Capitol to know about it?

A No.

Q You didn't want to talk about it over the telephone?

A No.

Q It had to be kept secret by not having the names on the record?

A That's right.

Q And, therefore, you knew it was improper?

A That's right.

Q And you are giving them something for nothing?

A Right.

Q Well, wouldn't you describe it as a bribe?

A I guess the final interpretation would be a bribe, yes.

Q And didn't you consider yourself then committing a crime by offering such a bribe?

A No.

MR. BYRNE: Well, Mr. Examiner, he is calling for him to state whether it was a crime or not.

I mean it's not within his scope to decide what it is as a crime or not, but this is a designation --

[Tr. 160]

EXAMINER FREDRICKS: Well, I will ask Mr. Berkowitz if this line of questioning will help in solving the issue here.

MR. BERKOWITZ: All right. I will let it pass. I think it is obvious to everyone that a bribe is a crime. It goes without saying. I don't need this witness's interpretation.

Q Mr. Friedman, were you present in this hearing room this morning when you heard your wife testify concerning the formation of the corporation, New York State Teachers' Study Group?

A Yes.

Q You heard that?

A Yes.

Q And you heard her testify that this corporation was formed by your lawyer, is that correct?

A Well, not my lawyer per se. An attorney that I knew that handled some of this type of work, yes.

Q For your travel agency?

A I beg your pardon.

Q Was he also the lawyer for your travel agency?

A No, he was not.

Q But you made the arrangements with him?

A That's right.

Q You also heard her testify that there was a batch,

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a series of checks of varying amounts which she signed on behalf of New York State Teachers' Study Group to Nelson Travel Agency and that these checks accomplished moneys for various flights, brochures, stamps, printing and for many things.

You heard that?

A Yes, I did.

Q And your wife then in the function of president of New York State Teachers' Study Group delegated you on behalf of that group to use those moneys for various purposes on behalf of this group?

A She didn't delegate me for this function at all.

Q Well, let me put it to you this way: These checks which Nelson Group Travel received included partial payments, full payments and varying amounts for various purposes, is that correct?

A That's correct.

Q And Nelson Group Travel Corp. was requested to use these funds for the purposes indicated on the checks themselves as the notations?

A That's right.

Q And your wife trusted you to handle these moneys accordingly?

A Certainly did.

[Tr. 162]

Q And you agreed to handle those moneys accordingly?

A I certainly did.

Q And when your corporation got into financial difficulties, you didn't anticipate that, did you?

A Anticipate financial difficulties?

Q Financial difficulties.

A No.

Q That was not within your contemplation?

A It should have been but it wasn't.

Q It wasn't, and so for these financial difficulties where the expenditures exceeded the receipts, you would not normally and, had this not happened, paid out these various moneys for the various purposes designated, isn't that right?

A That's right. That's right.

Q And, Mr. Friedman, isn't it true that if a check for a payment of a charter flight which was received by Nelson Group Travel, if thereafter this flight were cancelled, this money would have been returned by Nelson Travel to the New York State Teachers' Study Group?

A That's right.

Q Because you considered that as money of the New York State Teachers' Study Group?

A No, the funds came into the Nelson Group Travel and which were deposited in Nelson Group Travel checking

[Tr. 163]

account.

Q Yes, but I say suppose some funds in which you got, for instance, a check marked for British something or other, a certain amount, and thereafter the charter were cancelled, that money would then go back?

A That's the way it should work.

Q To the New York State Teachers' Study Group?

A As a form of refund.

Q Yes. Yes, so you were, therefore, as signatory on these checks-- and also you had some employee as signatory-- were there solely in charge of how these moneys were distributed and paid out?

A Yes.

Q It is unfortunate you got into these financial difficulties and, had the Capitol flight of July 1 been cancelled, whatever moneys you had not paid over you would return to the--

A That's the way it should work.

Q Pardon?

A That's the way it should work, yes.

Q Now other than Capitol Airways how many other airlines did you arrange flights on, charter flights on?

A Well, there was one with British Eagle Airways and there was one with Trans International Airways and-- no, I am sorry-- two with Trans International Airways and one

[Tr. 164]

with World Airways.

Q And prior to 1965, how many airlines other than Capitol did you arrange charters with?

A Just Capitol.

Q Just those that you mentioned now.

Does Nelson Group Travel advertise in any medium of any kind, newspapers or brochures?

A Nelson Group Travel sent out many brochures, yes.

Q To various types of organizations?

A That's right.

Q And you advertised Nelson Group Travel as being a specialist in group travel?

A Correct.

Q And as an independent travel agent?

A I don't think we said anything about independent.

Q You may not have said independent, but you considered yourself as travel--

A Group travel, yes.

Q And before either you or anyone else became aware of the financial difficulties in which Nelson Group Travel found itself, you owed the New York office of Capitol Airways some balances, did you not, or the corporation did, for some previous flights?

A I don't recall that.

Q Well, you mentioned that there were three flights which

[Tr. 165]

carried charters by Capitol in the previous year, that is, 1964.

A Right.

Q Right?

A Right.

Q And isn't it true that in connection with those three flights there were some balances due to Capitol--

A Absolutely not. Absolutely not.

Mr. Warren Clark wouldn't have let the flight go off owing money, and he wouldn't have left a flight go off unless he were paid 60 days prior to flight time.

There was no money owed Capitol for anything prior to 1965.

Q Well, let's get to 1965. Was there any money owed to Capitol for any flight prior to July 1, 1965?

A I don't think so. If there was, there may have been a small balance due for a United Federation of Teachers flight down to Jamaica. I don't recall.

Q There is such a possibility?

A There is such a possibility.

Q And if there were such moneys due on any earlier flights-- I say earlier-- prior to July 1, 1965, if Nelson had made some deposits or forwarded some deposits to Capitol for some flights subsequent to July 1, wouldn't it be proper to credit that amount on the previous indebtedness or

[Tr. 166]

balance due from Nelson to Capitol?

A Are you asking for my opinion, Mr. Berkowitz?

Q Well, wouldn't it be applied against the earliest flight?

A I don't think so permanently. I think the payment should be made for that specific flight rather than take money for the New York State Teachers' Study Group and pay for the United Federation of Teachers.

Q Mr. Friedman--

A I am sorry if I misunderstood you.

Q No, please, don't volunteer.

Don't please, attempt to argue with me. I am asking you very simple questions.

Now from what I gather you deposited in Nelson Group Travel Corporation moneys which were received for various purposes.

In other words, there was a comingling of funds?

A Right.

Q No question about that?

A No question at all.

Q So, therefore, when you issued a check to a particular carrier, whether it was Capitol or anyone else, there was no way of telling which dollars those represented, in other words, whether it was money received on any of these

[Tr. 167]

series of checks from New York State Teachers' Group or anyone else; they all went into the same pot, did they not?

A That's correct.

Q So that under those circumstances, if there had been a balance due from Nelson on flights performed by Capitol prior to July 1 and if some moneys were paid to Capitol by Nelson on flights not performed and the same moneys came from the general funds of Nelson, would that not properly be applied to the earlier debt?

A No.

Q No?

A Not if the stub of the check-- am I volunteering information?

Q You are volunteering. I didn't say anything about the stub of a check, unless it applied to a particular flight.

A No. I don't agree with that.

Q Pardon?

A I don't agree with what you just said.

Q Now did you know that prior to flight time the air carrier was required to collect its full charter price?

A That's correct.

Q And in connection with the July 1, 1965, flight you did know that Capitol had not been paid a balance of some \$16,000? Yes or no?

[Tr. 168]

A No.

Q Was there a balance due Capitol on that July 1st?

A I am-- there was a balance due--

Q I am not asking you how much.

A No.

Q There was a balance due on that Capitol flight?

A Yes.

Q You were shown two checks by Bureau counsel, BOE 98 for identification, one check in the amount of \$5,281, and BOE Exhibit 99, in the amount of \$5,185.20, totaling \$10,362, correct?

A Yes.

Q And you also know, I think you so testified, that there is a check from the New York Teachers' Study Group directly to Capitol for \$25,000.

My computation for those two checks for the \$25,000 results in a total of \$35,362.

Do you accept that as correct?

A The addition is correct, yes.

Q Now, Mr. Friedman, you also heard your wife testify, did you not, this morning, that you told her-- I don't know whether you say this is correct or whether she may be mistaken-- that instead of making a check payable by New York State Teachers' Study Group to Capitol Airways as per the notation at the foot of the contract, BOE 1, "Make all

[Tr. 169]

checks payable to Capitol Airways, Inc.," that you instructed or directed or advised or recommended or however it was put that as a matter of expedience-- I think that was the word-- that she make a check of the New York State Teachers' Study Group directly to Nelson.

Is that correct?

A Directly to Capitol.

Q Capitol?

A For \$25,000?

Q Yes. That check, yes, but that other check should be made not to Capitol but to Nelson?

A The \$25,000.

Q Other than \$25,000.

A Yes, I told her all the other checks would come through my office, that's right.

Q Well, did you tell her it would payable to your office and not to Capitol as a matter of expediency?

A I don't understand your questioning. I am sorry.

Q Did you at any time, directly or indirectly, state to your wife that instead of making checks to Capitol Airways, these checks for expediency should be made to Nelson?

A That's right.

Q You did tell her that?

A The only time I--

[Tr. 170]

Q Just a minute, please.

You are--

A You are not letting me answer a question.

Q Just a minute.

Counsel here, who represents the Bureau, will correct anything he wants to correct.

Would you know, please?

A My wife did not say that. She said the check for \$25,000 should be made out directly to Capitol Airways because I told her it would be more expedient that way and that's exactly what's happened.

Q Now, Mr. Friedman, wouldn't it be more expedient to have the other checks paid on this flight of July 1 also paid to Capitol?

A Yes-- no.

Q But that one check it would be more expedient to pay to Capitol?

A If you will let me explain.

Q Just yes or. no.

A No.

Q It would not be more expedient to have that check made to Capitol?

A The check was made to Capitol.

Q Mr. Friedman, before you appeared to testify today were you interviewed by anyone on behalf of the Bureau of

[Tr. 171]

Enforcement of the Civil Aeronautics Board?

A Interviewed? No. Absolutely not.

Q Were you interviewed by anybody representing
the Civil Aeronautics Board?

A No.

Q Did you make a statement?

A Well, I spoke to Mr. Byrnes for a minute, but I
wasn't interviewed by him.

Q When was it you spoke to Mr. Byrne?

A Oh, when I came back from lunch.

Q Today?

A Yes.

Q I am talking prior to today.

A Oh, yes, I was interviewed by Mr. Byrne and--
I did not get your name.

MR. NADONLEY: Nadonley.

THE WITNESS: Yes.

A (Continuing) I was interviewed by them in the
Bronx House of Detention.

Q Was this more than one interview?

A Just one.

Q And were notes made of this interview lengthy
notes, pages?

A I would say it was several yellow sheets, yes, sir.

Q And the interview took several hours?

[Tr. 172]

A A couple of hours. Maybe an hour and a half.

Q Did you sign any statement?

A No, I didn't.

Q And in this interview didn't you tell these gentlemen that, so far as you were concerned, amongst other things you received a lot of moneys from New York State Teachers' Study Group, and that these moneys were applied by you in the operation of your business, in the payment of various bills as required in the operation of the business?

A That's right.

Q And didn't your wife know that these moneys which she was paying on behalf of the Teachers' Study Group to Nelson were being used by the business to pay various bills?

A She thought we were getting a lot of money. She thought we were doing a tremendous business with other people.

She thought there was a lot of other money coming in.

Q Did you deceive your wife?

A Completely.

Q And she relied upon you in connection with the operation of these charter groups?

A Completely.

Q And she took what you told her in good faith as

[Tr. 173]

a hundred per cent correct?

A Yes, she did.

Q And she assumed that you were using these moneys that you received from her group for the purposes for which they were received?

A She thought all the flights had been paid up, yes.

Q The fact is you did not do so?

A That's correct.

Q And for that reason you were convicted of larceny?

A That's correct.

Q Now other than your dealings first with Mr. Clark, with Mr. Mitchell's predecessor, and thereafter with Mr. Mitchell, you had no other business transactions, I take it, with Capitol Airways except what you told us today, in other words, Mr. Mitchell in the New York office.

I am not talking about these propped deals of donating a part interest, a ten per cent interest in your travel agency.

I am talking about the charter flights.

A I am afraid the question is not clear to me.

Q All right. I will put it this way: You dealt with no one else in Capitol Airways except Mr. Mitchell, Mr. Schofield, and Mr. Mansfield?

A On the executive level, yes.

Q Yes. And previous to that, Mr. Clark?

[Tr. 174]

A Yes.

Q And during the regime of Warren Clark, now deceased, there were no problems?

A No.

Q He was an honest person?

A Completely.

Q And he acted within the scope of the authority which you knew he had as the New York representative?

A Right.

Q Would you say the same thing with your dealings with Mr. Mitchell?

A Yes. I never had trouble with Mr. Mitchell.

Q He acted within the scope of his authority in arranging these flights?

MR. BYRNE: Objection. I don't think he is in a position to know whether he acted within the scope of his authority.

MR. BERKOWITZ: All right. I will withdraw that.

Q So far as you know, the New York sales representative of Capitol Airways had to do with the making of charter agreements for flight dates which would be available when Capitol would have equipment available, is that correct?

A Basically, yes.

Q Yes. Other than that you knew that the New York office had no further authority; it was a sale office, is that

[Tr. 175]

correct?

A They would-- yes. Yes. Yes.

Q You didn't deal with any of the officers of the corporation at any time?

A I spoke with them on a couple of occasions.

Q Do you know who they were?

A Yes. I spoke with Roach, Mr. Roach.

Q Mr. Roach, the gentleman here (indicating)?

A Mr. Roach, I spoke with you on the phone at Nashville, and a heavy-set man I met at Warren Clark's funeral, I spoke with him a couple of times.

Q You mean you met him accidentally at the funeral?

A That's right.

Q But other than these telephone conversations, perhaps once with Mr. Roach?

A Just once, yes.

Q Did that have to do with a flight date, perhaps?

A I don't know what the situation is.

MR. BERKOWITZ: May we suspend for just a moment?

EXAMINER FREDRICKS: Yes. We will be off the record for a moment.

(Recess.)

EXAMINER FREDRICKS: We will be on the record again.

By Mr. Berkowitz:

[Tr. 176]

Q Therefore, Mr. Friedman, you were perfectly aware that the authority of the New York representative, first Mitchell, previously Clark, had to do with sales of charter flights and they were able to arrange with the company when certain equipment would be available?

A Yes.

MR. BYRNE: Objection. Isn't he drawing the conclusion as to that he knew the scope of authority?

EXAMINER FREDRICKS: I am going to have to ask the reporter to read the question.

(Last question read.)

EXAMINER FREDRICKS: I am going to let the question and answer stand, Mr. Byrne.

Q Now, Mr. Friedman, you used certain language in describing these checks that were made to Mr. Mitchell. You stated that they were quote ostensibly unquote loans and it is so noted.

At one time you said you didn't expect to collect these checks?

A That's correct.

Q Now if these were in fact not really loans, would you not have given this money in cash rather than by checks?

A Not necessarily. There was one cash transaction, too, which was repaid.

[Tr. 177]

Q Which was repaid?

A Yes, sir.

Q So that this cash transaction then actually was a loan?

A That's right.

Q And on these checks, right on the checks themselves, the notation was made, "loan"?

A Um hmm.

Q And actually you knew that all Mr. Mitchell could do for you was to prefer your company over that of some other agent with respect to certain prime dates for charter flights?

A I have already explained, Mr. Berkowitz, that there was other, there were other considerations.

Q Namely?

A Namely being appointed as the agency for charter groups that didn't have an agent of record.

Q But you say in two cases where your name was put down as agent, in one case the charter did not proceed; in the other case you didn't get the commission anyway.

A Well, there were supposed to be many more. In addition I was taken up to see the Knights of Pythias director, the Hadassah director, the B'nai B'rith director.

Q Well, this was for the purpose of building business for the future?

[Tr. 178]

A That is correct.

Q I see.

Did you think this was proper or improper to have your company's name as the agent when in fact your company was not the agent?

MR. BYRNE: Well, I object to that. I don't see the relevancy of what he thought was proper or improper.

MR. BERKOWITZ: This is a matter of cross-examination.

EXAMINER FREDRICKS: Yes.

MR. BERKOWITZ: And it has to do with the credibility of this witness.

EXAMINER FREDRICKS: Well, you are going rather extensively into Mr. Friedman's state of mind at the time of these transactions.

I wonder what we build on that.

MR. BERKOWITZ: Well, may I rephrase it then. I will withdraw the last question.

Q I think you testified that in no event would Capitol Airways lose any money if the name of your company were put down on charters as the agent, when in fact your company had not been the agent.

A And I think I answered you, I believe, that, that someone somewhere would be the agent. Somebody, but, too, I--

[Tr. 179]

Q Suppose no one were named as the agent.
Wouldn't that be a house charter?

A No. That's--

Q Would that not be possible when in fact you
were name was not put down and you were not the agent?

A I thought there was someone that the five per
cent commission had to be paid to.

Q Mr. Friedman, if there were an agent who claimed
the commission, didn't you know that putting your name down
would result in two people making the same claim?

A Not necessarily. Not necessarily.

Somebody was getting the five per cent commission.
If I were named as the agent I would get the five per cent
commission.

Q And suppose no one were named as the agent?

A Then no one would get the commission. I don't
know what you are driving at.

MR. BYRNE: Isn't this line of questioning
argumentative?

EXAMINER FREDRICKS: It seems to me it is, Mr.
Berkowitz, and fraught with legal conclusions.

MR. BERKOWITZ: Well, I will pass on except for
one more question. I think this should clear it up.

Q What I am driving at, Mr. Friedman, is that from
what you testified-- correct me if I am wrong-- I understand

[Tr. 180]

now that you were being helped by Mr. Mitchell not only in, perhaps, being preferred for prime dates for flights as against other agents but, in addition, getting an unexpected benefit by way of commissions.

A That's correct.

Q When I previously asked you whether or not this would not be stealing money from Capitol, you said that some agent has to get the commission.

A Someone or some agent has to get the commission.

Q Yes. I now pose to you: If there is no agent and no one gets it, then is that not taking money from Capitol?

A You are asking me the same thing again and I am saying, I say if no one gets the commission and I were to take it away from Capitol, obviously Capitol is being deprived of the commission.

I don't know, I don't know what you are driving at.

Q All right.

Whether or not it is true whether Mr. Mansfield was to participate in that proposed 10 per cent donation of stock you don't really know, do you?

A I beg your pardon? Whether he did know about it, is that what you are saying?

Q Yes.

A The only occasion I spoke with Mr. Mansfield about

[Tr. 181]

it on the phone at the one time was that Danny had-- quote-- "Danny had discussed the arrangements with me and we are going ahead on it," and he said, "fine." But there was nothing specifically said on the phone that would make me fully aware of whether he knew all the arrangements that had been made.

Q I am sorry. I don't get that. You mean you spoke with Mr. Mansfield on the telephone?

A That's right.

Q And Mr. Mansfield said to you what?

A I told him that Danny and I were going along on the arrangements that Danny had discussed with me.

Q Just arrangements? You didn't say what arrangements?

A No, I didn't say, and I said, "Buck, you ought to get up here so we can sit down and talk about it," and he told me that they were having their problems down in Nashville and he had to be down there, he couldn't get away for any period of time.

Q He didn't ask you what arrangements you were talking about?

A It wasn't spelled out specifically, no.

Q Could it have been some other arrangement than-- this 10 per cent capital stock donation?

A Not that I know of.

[Tr. 182]

Q Could you tell us about when the conversation took place?

A I would say around the same time that I was discussing with Mr. Mitchell, around March or April.

Q March or April '65?

A And that's only a guess. I don't remember it specifically.

Q Where is Miss Flanagan now?

A She lives in Canada.

Q Did you ever purchase Gail Travel?

A No.

Q What?

A No.

Q Weren't you also at one time in negotiation to purchase the Hotel De Caribbean?

A Figment of my imagination.

Q Pardon?

A It was a figment of my imagination that I would purchase a hotel.

Q Did you issue a check?

A Yes.

Q In what amount?

A The check was issued in the amount of \$4,000 and I changed, I altered the check to \$104,000.

Q When did you do this?

[Tr. 183]

A I don't remember the specific date, but it was the early part of June..

Q Were you ever charged with that crime?

A Yes, I was.

Q What happened with that charge?

A I received two years' sentence.

MR. BERKOWITZ: That's all.

MR. BYRNE: I have a few more questions, Mr. Examiner.

REDIRECT EXAMINATION

By Mr. Byrne:

Q I would like to refer you, Mr. Friedman, back to this BOE Exhibit 104.

You testified that you gave this check to Daniel Mitchell.

A That's right. I didn't personally give this to him. This was given to him by Mr. Don Schorr.

It's my signature, but Mr. Schorr gave that to Mr. Mitchell.

Q I see. Why was this check certified? Did Mr. Mitchell request that this check be certified?

A Yes. I think he did. I think he needed it right away. He had to negotiate it into funds immediately, I think, as part of an uncertified check.

Q For what purpose did he need this check?

[Tr. 184]

A He had a personal problem with money.

Q So you are stating that this was a matter of a personal loan, this particular check?

A Well, loan the way I interpret it is something you expect back.

Q Did you expect payment back on this?

A No.

Q Did you discuss whether he would pay you back?

A We didn't discuss payment. We discussed that he needed \$3,000.

Q Mr. Friedman, when you were late in making payments on the July 1, 1965, charter for the New York State Teachers' Study Group, did Mr. Mitchell ask you if this money was going to be forthcoming?

A Oh, yes. Yes.

Q I show you these letters which are marked BOE Exhibits 4 through 14. Do you recognize these as letters which Mr. Mitchell wrote you concerning the July 1, 1965, charter?

A Yes.

Q Yes.

You received these letters. Mr. Friedman, I would like to ask you-- I am not absolutely clear as to what the purpose of these checks that were given to Mr. Mitchell was. You stated that this last check was in the nature of a

[Tr. 185]

loan which you did not expect back.

A Right.

Q Well, why did you give Mr. Mitchell a loan of \$3,000 which you didn't expect back?

A He needed it for a personal problem that had come up.

Q Well, what was the reason you didn't expect the repayment on this check?

A Well, because I expected this to be treated the same as the other four \$500 I had given him.

Q What was the purpose of these checks again?

A Well, to be very specific, we were supposed to be given agency agreements for those charter groups that didn't have an agent.

We were supposed to be given leads if people came in requesting a flight for a charter group.

We were supposed to be given aircraft availability when it was necessary.

Q And this was a return for favors rendered?

A In substance, yes.

Q Or would these represent payment of, like repaying part of the commission you might receive on these charters which you expected?

A Something of that nature, yes.

MR. BYRNE: Mr. Examiner, at this time I would like

[Tr. 186]

to offer the checks marked BOE Exhibits 100 through 104 into evidence.

MR. BERNOWITZ: May I inquire, Mr. Byrne, whether there is any reference in the complaint to these checks?

MR. BYRNE: No, there is no reference to these checks in the complaint.

May I please explain? We are trying to show the course of conduct between Mr. Mitchell as the representative of Capitol Airways in New York and Mr. Friedman.

We are alleging that there is an agency relationship between Capitol Airways and Nelson Travel Service on July 1, 1965, charter.

Now I think all the personal relationship between these two parties is important on this issue of agency relation, and also on the possibility of negligence on the collection of payment of this charter price.

MR. BERNOWITZ: Mr. Examiner, I respectfully differ with my learned adversary.

The complaint alleges certain matters. It raises certain issues. Counsel is now going into collateral matters of which we were not apprised in the complaint or otherwise, and these checks, from the testimony of the witness, had to do with the personal relationship between him and Mr. Mitchell, which certainly was not within the scope of the duties or authority of Mr. Mitchell in the New York office;

[Tr. 187]

that's quite clear.

There is also now on the record by the testimony of this witness that Mr. Mitchell allegedly had some personal financial problems and that he was quote ostensibly loaning him this money and it did not in any way relate to the July 1 flight, which is alleged here, but in fact in return for this favor he would expect on other occasions to be preferred as against other travel agents in the availability of aircraft on prime dates and, perhaps, too, he might be benefited by obtaining some commission from Capito.. through this relationship with Mr. Mitchell by having his company named as the agent when in fact Nelson was not the agent.

I respectfully submit that these are all beyond the issues involved in this procedure, and it raises entirely different issues.

It doesn't affect what is here the prime issue in the proceeding, and I submit it is irrelevant.

EXAMINER FREDRICKS: It seems to me, Mr. Berkowitz, that the checks and the testimony relating to them do have a direct bearing on the question of agency, whose agent was Mr. Friedman in these transactions, what were his relationships with Capitol Airways, with the teachers' group.

It seems to me they are directly relevant.

MR. BERKOWITZ: I respectfully disagree with your

[Tr. 188]

view, because in the testimony it appears that this did not relate at all to the New York State Teachers' Group, but it was an exchange for possible or hoped-for favors whereby this witness may derive some financial benefit in other respects.

But I submit that there is no testimony, there is a complete absence of any proof that these checks were in any way linked with the July 1 flight which is what is in issue in this proceeding.

EXAMINER FREDRICKS: Well, in line with the view that I have requested, I will receive in evidence Exhibits BOE 100 through 104.

(BOE Exhibits Nos. 100 through 104 were received in evidence.)

MR. BYRNE: I have no further questions at this time of the witness.

MR. BERKOWITZ: Just one.

RECROSS-EXAMINATION

By Mr. Berkowitz:

Q Am I correct, Mr. Friedman, that in the summer of 1965 there were more charters than aircraft available?

A Yes.

Q There was a paucity of airplanes?

A Right.

MR. BERKOWITZ: No further questions.

[Tr. 189]

EXAMINER FREDRICKS: That completes the examination of Mr. Friedman? Then you are excused.

MR. BYRNE: Mr. Examiner, I request a brief recess before I call the next witness.

EXAMINER FREDRICKS: Yes. Is 10 minutes adequate? Or 15 minutes?

All right, a 15-minute recess.

MR. BYRNE: Thank you, Mr. Examiner.

(Recess.)

EXAMINER FREDRICKS: Let us come to order.

MR. BYRNE: Mr. Examiner, at this time I would like to re-offer the checks marked BOE Exhibits 55 through 96 into evidence.

You deferred judgment on these.

EXAMINER FREDRICKS: Yes.

MR. BERKOWITZ: I renew my objection, Mr. Examiner, on the ground that these checks are unrelated to the transaction involved in this proceeding and have to do with inter-company transactions between New York State Teachers' Study Group and Nelson Group Travel, and these are not related to the issues in this proceeding, and certainly are not binding on Capitol, and we take the position that they are extraneous and have to do with many other matters and transactions which are completely irrelevant.

[Tr. 190]

MR. BYRNE: Mr. Examiner, the reason why these checks are being offered into evidence, is, first of all we had testimony from Mrs. Friedman that she received payments from five charters for the summer of 1965.

Now these checks show exactly what she did with these payments. Well, she deposited them, first, in her bank account and then she made these payments to Nelson Travel Service for transmittal to the various air carriers involved, and I think certainly this is material.

MR. BERKOWITZ: But, Mr. Byrne, these relate not only to payments to air carriers but to payments for many other things.

MR. BYRNE: Well, for charter expenses. These relate to expenses that came out of money paid by the charter passengers.

MR. BERKOWITZ: For brochures, printing and so forth.

MR. BYRNE: But these relate to the charters and I don't see any harm to Capitol Airways if some of these checks were aside from charter expenses and so on. They just show she transmitted all the money she received to Nelson Travel Service other than certain payments she made to the carrier.

MR. BERKOWITZ: You are assuming that. There is no proof that the money she received was paid, came from

[Tr. 191]

these checks. There is no accounting.

EXAMINER FREDRICKS: I assume somebody will want to write a brief on this and then will be the best opportunity to argue what the evidence proves and what it does not prove.

As I see it, these checks are relevant. They bear on the issues and I certainly don't see that they are prejudicial to Capitol in any way.

They are of concern only as to the issue of whose agent was Michael Friedman in these transactions, and so Exhibits BOE 55 through 96 are received in evidence.

(BOE Exhibits 55 through 96 were received in evidence.)

MR. BYRNE: I also at this time would like to offer BOE Exhibit 105. That's a check stub marked 821.

I think I did not offer that into evidence previously. Mr. Friedman testified that he wrote a check to Mitchell for \$3,000, and that this check, BOE Exhibit 104 replaced that check.

MR. BERKOWITZ: This check in the sub is No. 821, marked "loan," Daniel Mitchell, payee, \$3,000, and I understand this check was not paid.

MR. BYRNE: It was replaced by the check marked

[Tr. 192]

BOE Exhibit 104.

MR. BERKOWITZ: Well, in that instance I think my previous objection was that these were unrelated transactions, personal transactions between Mitchell and Friedman, and I renew that objection at this time.

EXAMINER FREDRICKS: Well, I have already admitted 104. This relates to it, and I will also admit BOE 105.

(BOE Exhibit 105 was received in evidence.)

MR. BYRNE: At this time, Mr. Examiner, I would like to call Mr. Daniel Mitchell to the stand. Whereupon,

DANIEL ANTHONY MITCHELL, JR.,
was called as a witness, and having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q Mr. Mitchell, would you please state your full name and address for the record?

A Daniel Anthony Mitchell, Jr., Shelton Towers Hotel, 525 Lexington Avenue, New York City.

Q Mr. Mitchell, were you ever employed by Capitol Airways, the respondent? Were you ever employed by Capitol Airways, the respondent?

A Yes, I was.

[Tr. 193]

Q In what capacity were you employed?

A District sales manager.

Q In what city?

A In the City of New York.

Q During what period were you so employed?

A From November 16, 1964 through December 8, 1965.

Q Did you say from December '64?

A November 16.

Q November 16, 1964?

A '64.

MR. POLLACK: To when?

THE WITNESS: December 8, 1965.

Q Now what were your duties as director of sales for Capitol Airways in New York?

A My duties were to support charter flights over the networks that we were operating on, run a sales office, supervise the personnel that were employed under me.

Q How many employees were in your office?

A When I left there were three.

Q Did your office handle papers for charters that were made by chartering organizations?

A Yes, we received the checks and we in turn deposit them in the local bank, Capitol's account.

Q That's in New York City, Capitol's account was?

[Tr. 194]

A Yes.

Q Now, Mr. Mitchell, did you ever have any dealings with Nelson Travel Service or Nelson Group Travel Corporation on behalf of Capitol Airways?

A Yes, I did.

Q What was the nature of your dealings?

A To line up flights and to the Caribbean, European, any area that we could serve, to negotiate a contract, to obtain the clearance from Nashville as to whether or not we could accept the charter.

Q Were all charters for which there was a charter contract cleared through the home office of Capitol Airways?

A Yes, they were.

Q When were these charters cleared? At what time? When the contract was executed or--

A No, at the point of inquiry as to whether or not the aircraft was available.

Q I see.

A And on the strength of the availability we would then issue a contract and it would be issued subject to availability on signing of the contract.

Q Did your office handle all charters between New York and Europe for Capitol Airways, all charters?

A No.

[Tr. 195]

Q That originated--

A No, we didn't.

Q What was the scope?

A They were handled through various offices, Nashville, Los Angeles. In other words, I was not the only purpose booking the charter flights.

Q Mr. Mitchell, with whom did you deal in Nelson Travel and Nelson Group Travel Corporation, what particular person?

A Basically with Mr. Friedman and on rare occasions with his secretary, whose name escapes me for the moment-- Joanne-- and Mr. Schorr for a brief time.

Q Now prior to the summer of 1965 did Nelson Travel Service act as agent for any Capitol charters?

A Yes, they did.

Q What charters were these, if you remember?

A During my employment?

. During your employment.

A I believe there were two, the United Federation of Teachers.

Q United Federation of Teachers?

A Yes.

Q When did that flight occur, approximately?

A In April.

Q In April of 1965?

[Tr. 196]

A Yes.

Q What other flights?

A Those were the only two, sir.

Q Did you say there were two flights for the
United Federation of Teachers?

A To the best of my recollection, sir.

Q Both in April of 1965?

A Yes.

Q Did you execute a charter contract on behalf
of Capitol Airways with the New York State Teachers'
Study Group for a July 1, 1965 charter?

A Yes.

Q I show you this document which is marked BOE
Exhibit 1. Is that your signature which is on the
contract?

A Yes, sir, it is.

Q Was this the charter contract which related to
the July 1, 1965, charter for New York State Teachers'
Study Group?

A Yes, sir.

Q Mr. Mitchell, did you enter into an agency
agreement on behalf of Capitol Airways with Nelson Travel
Service for this charter flight for July 1, 1965?

A Yes, sir.

Q Is your signature on this contract?

[Tr. 197]

A Yes, sir.

Q That's BOE Exhibit No. 2?

A Yes, sir.

Q Mr. Mithcell, I show you these checks which are marked BOE Exhibits 98 and 99 which are in evidence.

Did you receive these checks from Michael Friedman or from Nelson Travel Service?

A It's rather difficult for me to tell you. I am sure that I-- they came through our office, but without a deposit slip that would accompany them--

MR. POLLACK: Can you speak up, sir, so that I can hear you?

THE WITNESS: Sorry.

A (Continuing) Without a deposit slip that would accompany the checks, why, I would not be able to tell what they were for.

Q I show you these deposit slips marked BOE Exhibits 15 and 16. Do those deposit slips contain entries for those checks?

A Yes, that's this one here.

Q Which one is that?

A This one covers this deposit here, deposit No. 2, which is marked "New York State Teachers' Study Group," and the agent in paranthesis.

Q In other words, you are referring to BOE Exhibit 105

[Tr. 198]

and this deposit slip relates to the check which is BOE Exhibit 98?

A That's correct, sir.

Q And you state that the entry No. 2 on this deposit slip, Exhibit 15, is that which refers to this check?

A Yes, sir.

Q May I ask you, Mr. Mitchell, what this word "agent" means?

A It means that the check was issued by the agent and not the charterer.

Q I understand.

Now with respect to the check which is marked BOE Exhibit 99 and the deposit slip, BOE Exhibit 16, does this deposit slip relate to that check?

A Yes, sir, it does. It's deposit No. 3.

Q Now, Mr. Mitchell, I show you the checks again which are marked BOE Exhibits 99 and 98. Did you place the endorsement on the back of these two checks?

A My secretary did.

Q Were these checks deposited in Capitol's account?

A Yes, sir, they were.

Q In the City of New York?

A Yes, sir, National City Bank, the First National City Bank.

[Tr. 199]

Q Mr. Mitchell, did you apply these payments, these checks towards payment of the charter flight of July 1, 1965?

A Yes, sir.

Q Now, in your experience as director of sales in Capitol, New York City--

A I was not director of sales. I was district sales ~~manager~~.

Q District sales manager.

In your experience as district sales manager for Capitol in New York City, was it common practice to accept charter funds from the travel agent on a particular charter?

A Yes.

Q It was a common practice?

A Yes, it's prevalent throughout the industry.

Q From your knowledge this is prevalent throughout the industry?

A Yes.

Q And was it common practice to accept checks written actually on the account of the travel agent?

A Yes, sir.

Q Do you know if your home office was aware of this practice?

MR. BERKOWITZ: That's objected to. How would he know?

[Tr. 200]

A I wouldn't know that.

Q Did you ever receive any instructions that payments should not be accepted from travel agents on charters from the home office?

A To the best of my knowledge, no.

Q Now you stated that Nelson Travel Service acted as agent on two charters prior to July 1, 1965 for the United Federation of Teachers, I believe you said.

A Those are the two that I recall, yes. I believe these were the only two.

Q Do you know if you accepted payment of the funds from Nelson Travel Service from these two charters?

A I would assume that I did. I would have had to, if I had countersigned the contract I would have had to take a deposit with it.

The contract is only signed on the basis that you receive a deposit with it.

Q Well, of course, there are a number of deposits that were made?

A Yes, but the contract is only countersigned when we receive a deposit with it.

Q I see.

A And a signed contract by the charterer.

Q Now do you remember if Nelson Travel Service attempted to make any other payments on its funds for this

[Tr. 201]

July 1, 1965 charter?

A No.

Q Maybe I can refresh your recollection on that point.

I show you the deposit slip that is marked BOE Exhibit 17 and I also show you this check which is marked BOE Exhibit 12.

Do you remember receiving this check from Mr. Friedman or Nelson Travel Service?

A Yes, I do.

Q The check is marked "payment stopped"?

A Yes, sir.

So I notice.

Q Did Mr. Friedman inform you why payment was stopped on this check?

A I don't recall his exact phraseology. I assume it had something to do with either he didn't have money in this account, it was in the other account-- this is--

Which other account would that be?

A He had another account. You have some yellow checks over there. Was it Nelson Group or Nelson--

Q Nelson Travel Service?

A Nelson Travel Service.

Q Mr. Mitchell, do you remember receiving a check for \$25,000 from the New York State Teachers' Study Group

[Tr. 202]

for the July 1, 1965, charter?

A Yes, sir, I do.

Q Who gave you this check?

Did Mrs. Friedman as head of the New York State Teachers' Study Group give you this check?

A Mr. Friedman did. I never met Mrs. Friedman.

Q Were you surprised to receive a check from the New York State Teachers' Study Group rather than from Nelson Travel Service or Nelson Group Travel Corporation?

A No.

Q But the normal practice was to receive payment from the travel agent, was it not?

A It varied.

Q Varied?

A Yes, sir.

Q Now, were the two checks from Nelson Travel Service and one check from the New York State Teachers' Study Group the only payments received for the July 1, 1965, charter--

A Yes.

Q -- that you remember?

A Yes.

Q Mr. Mitchell, I would like to show you these letters which are marked BOE Exhibits 4 through 14.

Well, I better read this into the record, exactly

[Tr. 203]

what these letters are.

BOE Exhibits 4, 5, 6, 7, 8, 9, 10, 11 and 14.

I would like you to look at these letters and tell me if you wrote these letters, if you recognize these as letters which you wrote Mr. Friedman with respect to this charter flight on July 1, 1965.

A This one I did not write. I signed it evidently, or my secretary did. I don't know. That's--

EXAMINER FREDRICKS: By Exhibit number? Which one?

THE WITNESS: Exhibit No. 5, sir.

Q Do you wish to go through each of these and state which letters you recognize Do you recognize BOE Exhibit 4?

A Yes, I do.

Q And 5 you don't recognize, but you believe this was written by your secretary and sent out through your secretary?

A Yes. This is a matter of procedure. It's not necessary--

Q Do you sign--

A Yes.

Q -- do you sign all letters that go out?

A Yes, normally, yes, because I am not in the office.

Q And now BOE Exhibit 6, do you recognize this?

[Tr. 204]

A Yes.

Q Yes, you do?

A Yes.

Q BOE Exhibit 7?

A Yes. I recognize this.

Q BOE Exhibit 8?

A Yes, I recognize it.

Q Yes. BOE Exhibit 9?

A Yes, I recognize that.

Q BOE Exhibit 10?

A I recognize 10.

Q BOE Exhibit 11?

A Yes, I recognize that.

Q BOE Exhibit 14?

A Yes, I recognize it.

MR. BYRNE: Now, Mr. Examiner, I have a letter and attachment. I would like to have the letter marked BOE Exhibit 106 and the attachment to the letter marked BOE Exhibit 107.

EXAMINER FREDRICKS: Very well. They will be so marked for identification.

(BOE Exhibits 106 and 107 were marked for identification.)

MR. BYRNE: Mr. Examiner, these are copies of the letter attachment (indicating).

[Tr. 205]

Q Mr. Mitchell, I show you this letter which is marked BOE Exhibit 106.

Is that your signature on this letter?

A Yes, sir.

Q Do you remember sending this letter with attachment to Mr. Michael Friedman?

A Yes. I don't know if the figures are accurate.

Q But this is a copy of a letter and an attachment that you sent?

A Yes.

MR. BYRNE: Mr. Examiner, I offer Exhibits BOE 106 and 107 into evidence.

EXAMINER FREDRICKS: Then Exhibits BOE 106 and 107 are received in evidence.

(BOE Exhibits Nos. 106 and 107 were received in evidence.)

Q Mr. Mitchell, do you remember contacting the New York State Teachers' Study Group with respect to payments on July 1, 1965 charter?

A At what time, sir?

Q Well, from the period when the contract was signed in November of '64 until the charter operated.

A No.

Q With respect to payment?

A No, I did not.

[Tr. 206]

Q Mr. Mitchell, I show you the contract, BOE Exhibit 1, which is the charter contract for the July 1, 1965, charter.

Now according to the contract terms which are on this contract, the total charges payable on the charter were 10 per cent on signing the contract, 10 per cent within 60 days, 40 per cent additional on March 1, 1965, and balance of charges were due on May 1, 1965?

A Yes, sir.

Q Now, according to your testimony all the payments which were made on this charter were late. In other words, the first payment you received on this charter was in approximately January 1965.

A I had received the first payment on November 6, and if you will go back to the correspondence, you will see that the check was returned because upon a phone call from Mr. Friedman's secretary, it states in the letter that she had-- he had sent a check from the wrong account.

Q I see.

A So consequently the check that replaced the initial one that came in on this date or the date that I signed the contract, I should say, which I don't have here.

This was issued on this date here, : do you see.

Now when Mrs. Friedman signed this I don't know.

[Tr. 207]

EXAMINER FREDRICKS: Mr. Mitchell, they can't hear you. Could you project your voice a little more?

THE WITNESS: I am sorry.

(Last answer read.)

Q I will show you Exhibit 4. Is this the letter you referred to?

A Yes.

Q In other words, you acknowledged receipt of payment on November 29, 1964?

A Yes. I wasn't in the employ of Capitol on November 6.

Q I see.

A I started on the 16th.

Q Now these other payments, the payment for instance that was due by March 1 of \$20,932, that had not been received on time, is that correct?

A No, it didn't.

Q And neither was the balance of the charges which were due on May 1, 1965?

A They were not received.

Q Did you usually allow lot payment on charter flights?

A No.

Q Beyond the contract terms?

A No.

[Tr. 208]

Q Why didn't--

A Sometimes they were extended by our home office under special circumstances.

Q Why did you extend payment on this particular charter?

A I was instructed to do so because Mr. Friedman had some deposits on other charter flights that he was operating with us for the future, in other words, on the Jamaica trips that we had started.

Q So in any case, if payment was not forthcoming on this, you mean you could apply charter payments from others?

Was that the reason?

A No.

Q What was the reason you extended the time?

A We extended payment to him because we felt that he was a man of means but that he was, his cash was just a little tied up.

Q I see.

Did your home office approve of this extension of time that was granted? Did you apply to your home office for approval or did you do this?

A I applied to Mr. Mansfield in our national office.

Q Did you do this orally?

[Tr. 209]

A Yes.

Q And did he approve this extension of time?

A Yes.

Q Were you concerned that payments were not forthcoming on this charter contract, full payment had not been received as late as June?

Were you concerned that payment might not be forthcoming?

A Well, this is when I first become concerned, and I also had heard rumors throughout the industry that there were other people who were operating flights for him that were not paid in full, and it was immediately after hearing these rumors that I went out and tried to collect it from him.

As a matter of fact, he did give me a personal check, you see.

Q Did you say he gave you a personal check?

A Yes.

Q What was this for?

A Payment of one of the payments; I don't know which one it was.

Q Well, there was only one flight for the New York State Teachers' Study Group for the summer. Which--

A Yes, but he had issued a check on his own personal account.

[Tr. 210]

Q Was this check applied?

A It wasn't applied because it wasn't cashed.

There were no funds in the bank.

I attempted to have it certified and he just didn't have sufficient capital there.

Q Was he trying to pay this July 1, 1965, charter--

A Yes.

Q -- from his personal account?

A Yes. He claimed there were funds being transferred from Jamaica and, while there were some funds transferred, they were not anywhere near what we required as a balance of payment.

Q When did you become suspicious that payment would not be forthcoming on this flight, approximately what time?

A I would say about four days, five days prior to the operation of the flight.

Q I see. But prior to that time you still thought that Mr. Friedman would come forth with payments--

A Yes.

Q -- for this flight?

A Yes.

Q When you realized that payment would not be forthcoming when you expected it, what did you do with respect to the passengers on the flight? Did you contact them

[Tr. 211]

or send any messages to the passengers?

A We didn't know what passengers would be on the flight. I had sent my salesman to his office in order to receive a manifest.

Q You had not received a certified manifest--

A No, we did not.

Q -- prior to-- what date was it? Four or five days before the flight?

A That's right. Four or five days prior. I don't remember the exact amount of days prior to the operation of the flight, but that's approximately it.

Q Did the employee you sent over to Nelson Travel's offices, did he get the passenger manifest?

A Yes, he did.

Q Or a passenger manifest?

A Yes, he did.

Q Did you contact the persons that appeared on this manifest?

A Yes, we sent telegrams to them.

Q You sent telegrams. What was in the telegram, if you remember?

A We advised them that we had not received full payment on the charter flight and that we were conducting a meeting to be held at the Shelton Hotel in New York City.

Q I see. At what time was this meeting supposed to

[Tr. 212]

take place or what date, approximately? Was it one or two days before the flight or--

A It was at least a minimum of two or three.

Q Just two or three days before the flight?

A Yes. Just as soon as we received the manifest we sent out the telegrams.

Q Would you please explain what transpired at this meeting of passengers?

A Well, to begin with, there were more passengers shown up than we sent telegrams out. What happened, I-- people hearing about the telegrams being received, it was a word-of-mouth reaction, and the passengers who were not listed on the flight had come anyway.

So consequently we had something like 500 people there instead of a 180.

Q I see.

A So apparently Mr. Friedman had booked three other flights supposedly on Capitol, when he only had booked one, you see.

Q In other words, Mr. Friedman had booked three flights when there actually was only one flight, you stated?

A Yes.

Q Now what did you tell the persons who were supposed to be on this charter on July 1, 1965?

[Tr. 213]

A I merely advised them that we had not received full payment and that in accordance with the CAB rules we could not operate the flight unless payment was received in full, and we offered to refund the moneys to them and they in turn suggested that they put up an additional amount in order to cover the balance.

Q Who suggested that they put up an extra amount?

A The passengers.

Q Well, didn't you state to them that you couldn't operate the flight unless you received additional payments, that you were short \$16,000, and that it would be necessary to obtain further funds before you would?

A No, I stated that we could not, legally we could not operate the flight unless we were paid in full.

Q Unless you were paid in full?

A Yes.

Q You stated that to the passengers?

A Yes.

Q Who attended this meeting besides yourself?

A Mr. Berkowitz.

Q Did Mr. Berkowitz and yourself represent Capitol Airways at the meeting?

A Yes. It was later attended by Mr. Mansfield and Mr. Schofield. They had arrived later.

Q Now each person that was on this July 1, 1965,

[Tr. 214]

charter for the New York State Teachers' Study Group, did each of them pay the \$92.50 which was collected?

A Who was originally scheduled on the flight?

Q Yes, the ones who actually went on the flight, were each required to pay a specified amount so that they could go on the flight?

A We had merely taken the balance and we had divided it among 183 passengers and it was done very roughly and it was a madhouse scene but--

Q I see, but each person who went on this flight, were they required to pay an additional amount before they could go on the flight?

A They were not required an additional amount. We were going to refund their moneys to them.

Q So persons who did not pay this extra money, you were willing to refund their money to them?

A Yes. We were willing to refund their money to them. It was refunded to them. It was taken out of New York State Teachers' account.

Q Well, it wasn't taken out of Capitol's account?

A We had never received it from Nelson Group Travel.

Q Mr. Mitchell, I show you the following checks which are marked BOE Exhibits 100 through 104 which are in evidence. Did you receive these checks from Mr. Friedman?

[Tr. 215]

A Yes, sir.

Q Did you endorse the backs of each of these checks?

A These four.

Q I see.

In other words, the checks that are marked BOE Exhibits 100 through 103, you endorsed those checks on the back?

A Yes. Mr. Friedman had issued a check prior to this.

Q Is this BOE Exhibit 104 that you are referring to?

A Yes, prior to this one which was returned for insufficient funds, and my bank had made payments against it. So they requested the certified check from Mr.

Friedman.

Q Your bank required?

A Yes.

Q Did you deposit these checks in your personal account?

A Yes, I did.

Q In what bank was your personal account?

A Irving Trust Company.

Q Now what was the reason that Mr. Friedman gave you these checks?

A They were loans.

[Tr. 216]

Q They were loans?

A Yes.

Q Did you expect repayment for these loans?

A Yes, sir, absolutely.

Q Did Mr. Friedman give you a specific time in which you were supposed to repay these loans?

A There was a generalized time. It was toward the end of June and July when my commissions would be coming in in a substantial amount.

You will recall I started work with Capitol in 1964, in November. The period between November, May, June and July, those dates were practically sold out, so consequently my commissions were very low, extremely low.

Q Did you ask him for these loans?

A On the first two, no. I believe that first check was issued on February 1st, was it not?

Q Yes. You may look at them again.

A Yes.

No, he came to my office on a Monday morning. He learned about my problem and he wanted to be of assistance.

Q What problem was that?

A It was a personal problem.

Q I see, and you needed money?

A Yes.

Q And he volunteered to give you this check?

[Tr. 217]

A He had it with him. It-- those checks normally come in a book, and I refused--

Q He came with spare checks?

A No, he came with one check, that one that's issued on February 1, and he said, "Danny," he says, "the chances are that you probably need money," and I said, "Well, quite frankly, I do, but I can hold off. Never mind."

And he accepted and we entered into this agreement that it would be on a loan basis, and he would be paid back when my commissions started coming in, which would be towards the end of June or July.

Q Now Mr. Friedman testified earlier that he gave these checks for turning business over to Capitol Airways.

A That's not true.

Q That is not true?

A That's right. I have been in the airline business too long, to accept a check in payment of a gratuity.

Q I see.

Now this last check that Mr. Friedman gave you, the one marked BOE Exhibit 104, it is dated May 4, 1965.

Now you accepted this check on May 4. You realized at that time, did you not, that full payment had not been made on this July 1, 1965, charter?

A I did not accept that. That was issued directly to the bank to cover the check that was issued

[Tr. 218]

earlier, in April.

Q I see.

This replaced a check that was issued a month earlier?

A That's right.

Q At that time in April you realized that full payment had not been made on the charter, did you not, on the July 1, 1965?

A Of course, I realized it in November, that full payment wasn't made on the charter.

Q Mr. Mitchell, did you ever have any personal financial transactions with Mr. Friedman?

A No.

Q Did Mr. Friedman ever offer you a financial interest--

A He did.

Q -- in Nelson Travel Service?

A Yes, sir, he did.

Q Would you please explain the circumstances that surrounded that or at what time this occurred?

A I don't recall the specific time. I simply wasn't interested in it, and I told him that I certainly couldn't go into it working for Capitol Airways and it was just disregarded "period."

Q At what time was this trans- --

[Tr. 219]

A I forget when he mentioned it to me.

Q What time?

A I forget. He said it was March or April.

Q Well, do you know?

A I don't know. Mr. Friedman said March or April and I said at this time, if that's when it was brought up, that this is just ridiculous, it's impossible.

Q I refer you back to BOE Exhibits 100 to 104.

The checks you stated were personal loans. Did you repay these loans at any time?

EXAMINER FREDRICKS: Did you answer that question, Mr. Mitchell? I didn't hear your answer.

THE WITNESS: I am sorry. I did say no.

Q Were you a close personal friend, or at least a personal friend of Mr. Friedman? Were you well acquainted with him?

A I was acquainted with him. I was not a close personal friend. He was a client I had to cultivate as a friend, such as in the case with any other travel agent, who does business with him.

Q Were you acquainted with him prior to November 1, 1964, sir?

A I had never met him, sir.

Q Did Capitol Airways, did you on behalf of Capitol Airways ever execute any other charter contracts for

[Tr. 220]

charter flights for the New York State Teachers' Study Group that would be operated during the summer of 1965?

A No, there was only the one.

Q The one contract for July 1, 1965?

A Yes.

Q Were you aware that the New York State Teachers' Study Group was advertising that Capitol would operate--

A No.

Q -- flights on other dates?

A No, I wasn't. The only one I knew about was our own.

Q The first time you learned about this was at the meeting, are you saying, that occurred over approximately June 30, when 500 passengers--

A No, just a few days before that. That was when I had sent my salesman up to Mr. Friedman's office, we discovered that there were several manifests and they were all marked "Capitol," and, in fact, we picked up two.

In fact they weren't marked "Capitol."

There was one marked "Capitol," and there was another one with no heading on top.

I think what he was doing, he was trying to get an aircraft with another company and then he was trying to put them on that company.

[Tr. 221]

Q What you are saying is you are not aware of any other charter for any other flight with Capitol Airways except the one of July 1, 1965?

A That's right.

Q Did you receive a statement of supporting information for the July 1, 1965, charter for the study group?

You stated that you did not receive a certified passenger list. Did you receive a statement of supporting information?

A I have no memory of that.

MR. BYRNE: I have no further questions.

MR. BERKOWITZ: Mr. Examiner, it is a quarter of five. I understand we were to recess about five.

My cross-examination will certainly take more than 15 minutes and I don't know whether it would be practical to start now or whether you would deem it best to continue tomorrow morning.

I think that, rather than break the cross-examination at this time, it would perhaps be more useful and perhaps be more beneficial to the parties if we had about this 15-minute start.

EXAMINER FREDRICKS: You will have other witnesses, Mr. Byrne?

MR. BYRNE: I have other witnesses. I have several

[Tr. 222]

witnesses scheduled for 10 o'clock tomorrow morning.

Their testimony will be brief.

I think, if there is to be a postponement of his continuing his testimony, it might be better to have him testify tomorrow afternoon if we continue his testimony, because it might be inconvenient to the witnesses tomorrow morning.

MR. BERKOWITZ: Is that agreeable to the witness?

THE WITNESS: Yes.

MR. BERKOWITZ: It is agreeable to me.

EXAMINER FREDRICKS: Can we fix a time so Mr. Mitchell will know?

MR. BYRNE: Yes. I believe about two o'clock, because I expect to finish the testimony of the other witnesses at that time.

EXAMINER FREDRICKS: All right. Mr. Mitchell, then we will expect you at two o'clock tomorrow afternoon to respond to cross-examination by Mr. Berkowitz.

Now before we close for the day, is there any sentiment for starting earlier than 10 o'clock?

MR. BERKOWITZ: I understand that the witnesses-- I may be wrong-- are subpoenaed for 10 o'clock.

MR. BYRNE: For 10 o'clock.

EXAMINER FREDRICKS: Well, let's hold to that schedule then. I don't think we can do anything useful by

[Tr. 223]

coming together before 10.

Very well. We will continue the hearing now to resume in this room tomorrow morning at 10 o'clock.

(Whereupon, at 4:45 p.m., the hearing adjourned until 10:00 a.m., Wednesday, April 20, 1966.)

[Tr. 224]

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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In the Matter of:

CAPITOL AIRWAYS, INC., ENFORCEMENT

PROCEEDING

Docket No. 16370

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Pages 190 thru 368

Date April 20, 1966

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[Tr. 225]

A

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
William Rothberg	192	197	218 224	223
Martin Festinger	225	234	239	240
Louis Geller	241	248	252	253
Sid Neschis	255	266		
Harry H. Brecher	270			
Daniel Anthony Mitchell (Recalled)	-	280	304 316	315 318
Francis J. Roach	318	335		
George Berkowitz	344	352		

E X H I B I T S

<u>NUMBER</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
BOE Exhibits 108, 109	227	229
" " 110		258
" " 111	262	262
 " 1 thru 25		278
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" " 2	331	331
BOE Exhibits 28 thru 54		355

[Tr. 226]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

In the Matter of:

CAPITOL AIRWAYS, INC., ENFORCEMENT
PROCEEDING

:
:
Docket No. 16370
:
:

Hearing Room B
Fourteenth Floor
30 Church Street
New York, N. Y.
Wednesday, April 20, 1966

The above-entitled matter came on for hearing,
pursuant to adjournment, at 10:00 a.m.

B E F O R E:

BARRON FREDRICKS, Hearing Examiner

APPEARANCES:

ERIC J. BYRNE, ESQ., and
V. MICHAEL STRAUS, ESQ.,
Civil Aeronautics Board,
Washington, D. C.
Appearing on behalf of the Bureau of Enforcement,
Civil Aeronautics Board.

GEORGE BERKOWITZ, ESQ.
233 Broadway
New York, N. Y.

-and-

MESSRS. SEAMON & SULLIVAN
700 Woodward Building
Washington, D.C.
Appearing on behalf of the Capitol Airways, Inc.
By GEORGE BERKOWITZ, ESQ., of Counsel.

[Tr. 227]

APPEARANCES (Continued):

FRANCIS N. POLLACK, ESQ.
11 West 42nd Street
New York, N. Y.
Appearing on behalf of Teacher Members of
NYSTSG (Travel Committee)

[Tr. 228]

P R O C E E D I N G S

EXAMINER FREDRICKS: Let us come to order.

Mr. Byrne, do you want to proceed now?

MR. BYRNE: Mr. Straus will examine.

EXAMINER FREDRICKS: Very good.

MR. STRAUS: I would like to call Mr. William Rothberg. to the stand.

Whereupon,

WILLIAM ROTHBERG,

was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Straus:

Q Will you state your full name for the record, please?

A William Rothberg.

Q Where do you live?

A 1459 Wythe Place, Bronx, New York.

Q By whom are you employed?

A I am employed by the State of New York as an assistant attorney general.

Q And that is your position or title, assistant attorney general?

A That is correct.

Q If any, what is your connection with New York State

[Tr. 229]

Teachers' Study Group charter?

A Our office was investigating this charter and the dealings of Michael Friedman.

Q How did you first hear of the charter?

A Our office received complaints from consumers.

Q Did you attend any meeting of the charter group or any meetings of the charter group?

A Yes, there was a meeting called on the 29th of June, 1965, at the Shelton Towers Hotel in the evening.

Q That's Lexington Avenue and 49th Street in New York?

A I believe so.

Q Were any other people at the meeting besides yourself and, let's say, the few passengers?

A There were more than a few passengers.

MR. BERKOWITZ: Yes, I was about to object to the suggested statement by counsel a few passengers. It was one of the biggest mobs I have ever seen in my life.

Q Who called the meeting?

A I believe it is Capitol Airways.

Q How did you determine that? Well, why do you believe it was Capitol Airways?

A Well, this is what we were informed.

Q From the complaints that came into your office?

A From the people at the meeting.

[Tr. 230]

Q All right. Did anyone speak at the meeting?

A Yes, numerous people spoke. There were several people who spoke. Mr. Berkowitz spoke and Daniel Mitchell spoke.

Q Daniel Mitchell who was the district sales manager of Capitol at the time for the New York area?

A That was what we were informed.

Q I wonder if you could tell us for the record what Capitol's representatives said at the meeting, just sort of a narrative, a summary narrative. Don't go too far into what they said.

A Mr. Mitchell?

Q Well, Mr. Mitchell, perhaps Mr. Berkowitz, whatever order you would like to take them.

A Well, Mr. Berkowitz appeared at the meeting first and he told the group that the flight had not been paid for and that Mr. Mitchell was coming and he tried to calm the group down because they were quite excited, until Mr. Mitchell arrived.

After Mr. Mitchell arrived he stated that he had approximately \$25,000 for the flight which was to take off on July 1.

He said that he knew of no other flights, the only people who were invited to attend this meeting were people who were supposed to be on this July 1 flight.

He said the flight would not go off until Capitol

[Tr. 231]

received the additional moneys towards the charter price, which he further stated was \$92.50, I believe.

Q Now who did you say suggested this?

A Mr. Mitchell.

Was there anything further you would care to add to that statement? I mean, is there anything else about the meeting that you would like to add?

A Well, at this time many of the people who were supposed to be on other flights were clamoring, "Why apply this money to this flight? It should be refunded to everybody."

But Mr. Mitchell appeared that he wanted this flight to go off; naturally he didn't want to lose the business.

MR. BERKOWITZ: I object to that, and I ask that it be stricken out as to that "Naturally he didn't want to lose the business" as a conclusion of this witness and not responsive to the question.

I ask that it be stricken.

MR. STRAUS: Why is it not responsive to the question? I am asking what happened at this meeting. We will strike out "naturally", if you like.

MR. BERKOWITZ: Strike out from the word "naturally," which is this witness's conclusion.

EXAMINER FREDRICKS: Did Mr. Mitchell say he didn't

[Tr. 232]

want to lose the business or is this an interpretation?

THE WITNESS: This is an interpretation.

MR. STRAUS: Well, all right.

EXAMINER FREDRICKS: All right. We will strike it.

Q Was there any explanation as to why Capitol had waited until I guess it was one day before the flight was to leave to actually inform the passengers at this meeting of the problem that had arisen?

Did Mr. Mitchell and Mr. Berkowitz say why they had waited until that moment to get these passengers there to tell them that?

A I don't recall.

MR. BERKOWITZ: Pardon me. I think counsel is in error. I believe it was two days before.

Q Two days before.

MR. BERKOWITZ: Two days before.

A I don't remember.

Q All right. At this meeting at some time did anyone pay Capitol's representatives a sum of money?

A Numerous people were writing checks for the \$92.50.

Q For the \$92.50.

Were they told that after they paid their \$92.50 they were supposed to meet somewhere the next day or whatever date it happened to be, July 1st, and actually go on the flight

[Tr. 233]

then after they paid?

A They were told a date and time to meet for the flight.

Q All right. Did the figure \$25,000, which was mentioned at the first, ever change as the meeting went on?

A Yes.

Mr. Mitchell mentioned a sum of money approximately \$7,000-- these figures were approximate at the time-- that he said he also would have for this flight.

Q Did he mention what source this \$7,000 came from?

A He did not.

MR. STRAUS: Can we go off the record for one second?

EXAMINER FREDRICKS: Off the record.

(Discussion off the record.)

MR. STRAUS: All right. On the record. You may cross-examine.

CROSS-EXAMINATION

By Mr. Berkowitz:

Mr. Rothberg, do you recall at the night of this fateful meeting meeting with me at the Shelton Hotel and passing a few words?

A Yes.

Q And your associate, Mr. Steven Mindell, also an

[Tr. 234]

assistant attorney general, was present at that meeting?

A Yes.

Q And do you recall at the time of this meeting that there were crowds of people who were in the meeting, who flowed out, and there were crowds of people out in the hallways and the corridors, and they flowed out in all directions, correct?

A Yes, they were moving.

Q And there may have been four or five hundred people there?

A I don't know if quite that many, but there were a huge number of people, much more than could comfortably fit in that room.

Q Right, and it was allegedly the hottest night of the year, do you recall that?

A Yes.

Q And do you recall also there was no air conditioner? Do you recall the perspiration running down my face?

MR. STRAUS: Mr. Examiner, is he setting up for the Watts riot? I don't know what the connection is.

MR. BERKOWITZ: I am testing the witness's recollection and refreshing it somewhat.

Q Now, Mr. Rothberg, you stated that I got up and spoke to the crowd and at that time Mr. Mitchell was not present.

Well, if I got up, do you recall me getting up on a

[Tr. 235]

chair above the crowds so I could be seen and heard,
somebody holding me on a chair?

A I believe you did.

C Yes.

A I know Mr. Mitchell did.

C And in order to have a complete statement of what took place at that meeting, permit me to read from an affidavit which I made in a proceeding instituted by your office in an order enjoining and restraining Michael Friedman, Sari Friedman, Patricia Flanagan, Nelson Group Travel Corp., New York State Teachers' Study Group, Capitol Airways and Daniel Mitchell pursuant to Article 11 of the Business Corporation Law and Section 63, Subdivision 12 of the Executive Law --

Mr. STRAUS: Will this be placed in evidence?

MR. BERKOWITZ: I am going to read a portion of the affidavit which will be appropriate to this testimony.

MR. STRAUS: Well, will you place the whole affidavit in evidence?

MR. BERKOWITZ: I think there are portions here which have to do with questions of law involved in this proceeding which I am reading from which would not be pertinent here.

But I would be happy to place in evidence a portion of the affidavit which I want now to read to the

[Tr. 236]

witness.

MR. STRAUS: I would prefer to have it in evidence.

EXAMINER FREDRICKS: You will let counsel examine the affidavit?

MR. BERKOWITZ: Certainly. Gladly.

MR. STRAUS: All right.

Q Now in this proceeding, Index No. 4221/1965, Supreme Court, State of New York-- you are familiar with that proceeding?

A I am aware of that proceeding, yes.

Q And in that proceeding orders of injunction have been entered, have they not, against Michael Friedman, Sari Friedman, Nelson Group Travel Corp., New York State Teachers' Study Group?

A Well, I know temporary orders were entered. I don't know if the temporary orders were, because Mr. Mandell is handling it.

Q Yes, the record will so show.

By stipulation orders have been entered which will terminate the proceedings against those respondents.

And you are also aware, are you not, that there is now pending for decision before the Supreme Court the application of Capitol Airways, to dismiss that proceeding against them?

A I am.

[Tr. 237]

Q And that's not yet determined, right?

A Not to the best of my knowledge.

Q Now, permit me, please, to read you this portion of my affidavit, and would you be good enough to tell me whether this jibes with your recollection?

"The flight was scheduled for July 1, and in fairness to the members of the charter group and as above-stated for the protection of Capitol, decision would have to be quickly made. June 28"-- I think the date should be June 29-- I am not too sure of the date either.

A The date of the meeting was June 29.

Q This should be June 29.

"... was supposedly the hottest day of that year and the meeting was a hectic one for a number of reasons.

"Not only was it intensely hot without air conditioning, but in addition it appeared that other teachers who were not members of the charter party but who had allegedly paid Nelson and/or Friedman moneys for other trips which Friedman was supposed to book, were also present, although not invited.

"Hundreds of people were milling around and there was an overflow crowd extending out into the hallways and corridors. There was difficulty in maintaining order.

"Attempts were made to have teachers who were not

[Tr. 238]

members of the charter party leave the meeting but this was to no avail. A number of teachers attempted to become spokesmen and tried to drown out others.

"There was also present at this meeting assistant attorneys general, Stephen Mindell, Esq., who makes the answering affidavit, and his associate, William Rothberg, Esq.

"Deponent stated to this group that Capitol was required by its tariff on file with the Board to charge the tariff price for the round-trip transportation, that Capitol was more concerned with its compliance with the law than with the difference in moneys received, that there was a problem of whether the operation of the charter with Capitol receiving less than its tariff would constitute a violation of the Federal Aviation Act, and that Capitol was prepared to return the moneys it had received and to cancel the charter in question.

"I was told that at the time there would have been no problem in replacing this charter if it were cancelled, as the demand for charter was greater than the available than the DCA jet airplanes.

"It was explained that the meeting was called because of a newspaper article which indicated Michael Friedman, the operator and/or owner of Nelson Group Travel had been arrested and was obviously financially

[Tr. 239]

irresponsible, that this made it obvious that Friedman and/or Nelson was not in a financial position to pay the balance of the charter price.

There were loud outcries and repeated requests that the group be permitted to pay the balance, that Capitol proceed with the charter.

"It was claimed that these people had made commitments and the arrangements would be difficult to change. They pleaded that the flight be not cancelled."

Now, if I may digress for one moment off the affidavit, I recall one or more teachers also stating and pleading that they had rented their homes for the summer and had no place to stay, and were very insistent that everything be done to have the charter proceed and they were anxious to have it go and pay the difference.

Now I will continue with the affidavit.

MR. STRAUS: Mr. Examiner, could we pause for a moment? Before he continues with the affidavit, I would preliminarily like to object to the entry of, the reading of the affidavit, because most of this information is already in the record on the answer and the other portion is on the record in the cross-examination that Mr. Berkowitz has just placed before Mr. Rothberg, and we don't really need it more than once.

MR. BERKOWITZ: Mr. Examiner, this is in the nature of

[Tr. 240]

cross-examination. This witness has testified on direct to what took place.

You may recall that his testimony concerning the statements made by me was very abbreviated and did not contain these matters which I am now reading.

I would like the witness when I am through which I will be in another moment, to testify whether or not this does refresh his recollection and jibes with his recollection of what took place at this meeting.

MR. STRAUS: Mr. Examiner, I would like to object. I would like Mr. Berkowitz to get on the stand and testify to what he said if he would like to do so, that I have tested the witness' recollection and Mr. Berkowitz has by repeating the testimony to other parties in the other answer.

EXAMINER FREDRICKS: Really, this isn't cross-examination, Mr. Berkowitz. You are eliciting some additional material.

MR. STRAUS: We would be happy to have Mr. Berkowitz on the stand to say exactly what he said.

MR. BERKOWITZ: You said that, counsel. May I continue, please?

MR. STRAUS: You certainly may.

MR. BERKOWITZ: This witness was asked on direct what took place at this meeting, who was present. He

[Tr. 241]

mentioned that I was, and he was asked to tell what I stated.

I submit that this witness stated very briefly, partially, what was stated, and not all of what was stated, and I am now in cross-examination in connection with that question, that is, he was interrogated on this question of what was said, and this is now what I am cross-examining on, Mr. Examiner.

MR. STRAUS: I would like to renew my objection. Mr. Berkowitz may get on the stand, if he would like to say that.

EXAMINER FREDRICKS: It seems to me, Mr. Berkowitz, that you were departing from cross-examination and conducting your own direct examination and certainly are leading the witness.

MR. BERKOWITZ: Well, on cross-examination, as you well know, this is permissible. He is not my witness.

EXAMINER FREDRICKS: If it is cross-examination, that's true.

MR. STRAUS: This is direct examination

May I, to avoid any further debate with counsel, perhaps to expedite in this fashion, may I ask the witness, up to the point that I read, without going further, does that accord with your recollection?

A Not completely.

[Tr. 242]

Q In what respect does it not accord with your recollection?

A Well, I remember that you stated that the flight could not take off unless Capitol could pay the amount of their tariff.

As far as a replacement charter, if this charter was cancelled, I don't remember anything being spoken about.

Q No, nothing was spoken about that.

That of course was not stated at the meeting, but let me ask you this, Mr. Rothberg: Do you recall me stating that Capitol was more concerned with its compliance with the law, provisions of tariff, than with the difference in moneys received?

MR. STRAUS: Mr. Examiner, we have this answer. I will stipulate that the answer says that.

MR. BERKOWITZ: Just a minute. This is proper cross-examination. I respectfully submit that these objections are frivolous.

Whether or not it is stated in the answer does not restrict me from cross-examining a witness.

MR. STRAUS: We don't need it on the record anymore.

MR. BERKOWITZ: I respectfully submit that it is not necessary for counsel to tell what is needed on the record.

[Tr. 243]

MR. STRAUS: I will withdraw my objection if Mr. Berkowitz will have this question answered and close up his affidavit.

If he would like to get on the stand and testify to that, fine.

MR. BERKOWITZ: I respectfully submit that I don't intend to be governed by Bureau counsel's ideas of what my cross-examination should be or how I should direct my defense.

MR. STRAUS: I will withdraw the objection. If Mr. Berkowitz will go ahead, it's fine.

MR. BERKOWITZ: I submit it is proper.

MR. STRAUS: The only thing I am objecting to is Mr. Berkowitz reading his affidavit into the record on cross-examination.

MR. BERKOWITZ: I have resisted doing so. I am now cross-examining the witness in the form of questions.

By Mr. Berkowitz:

Q Mr. Rothberg, I again ask you, do you recall me stating to the assembled group that Capitol was more concerned with its compliance with the tariff, that is, with the law regarding tariffs, than with the difference in amounts received?

A I don't remember that phraseology.

Q Now do you remember something like that?

[Tr. 244]

A I remember that Capitol would not let the flight take off unless it was paid the amount of its tariff.

Mr. Rthberg, you are an experienced lawyer. That's not an answer to my question, is it?

I ask you again, do you recall-- you said not in that phraseology or in those words.

Do you recall whether it was in similar words?

A In words that I just described.

Q No, I will ask you again.

Do you recall me saying in effect or in substance that Capitol was more concerned with its compliance with the law regarding tariffs than with the difference in moneys received?

A I don't remember that type of thing.

Q Now were you inside the meeting room at all times or did you also go out in the hall?

A I was outside the hall part of the time.

So there were times when you did not hear what was said, is that correct?

A True.

Q So you can't say whether this was said or not.

A That's correct.

EXAMINER FREDRICKS: Mr. Berkowitz, how important to this case is it whether it was said or not?

MR. BERKOWITZ: It was very important for this reason,

[Tr. 245]

Mr. Examiner. We have here involved as alleged in the affirmative defenses the statement that's contained in the answer, that this problem involved an interpretation of tariffs, that I, acting as the New York counsel, made a spot decision at the time, it was my legal opinion that, unless Capitol collected the balance of its tariff, this might and possibly would constitute a tariff violation, and I so expressed to the people, and I recall that this witness was at times in the meeting room and out, at times was outside, and in fairness to the witness, I don't think he heard everything.

EXAMINER FREDRICKS: He has answered the question.

MR. STRAUS: Mr. Examiner, he has answered the question three times.

EXAMINER FREDRICKS: Let's go ahead.

MR. BERKOWITZ: Go ahead. All right.

Q Now, Mr. Rothberg, did you hear me state to people at this meeting that Capitol was prepared to return the moneys it had received and to cancel the charter? Did you hear me say that?

A I don't remember you saying that.

Q You don't say that I didn't say it?

A I didn't say that.

Q All right. Did you also hear people ask either Mr. Mitchell or myself, "Please have the charter go on," and

[Tr. 246]

did you see people hold checks in their hands?

A Later on in the meeting, toward the end, people had checks, but after Mr. Mitchell had spoken.

Q No. Please answer my question.

Did you hear-- part of the question was did you hear people request that the charter go on?

A At what time?

C At any time.

I didn't limit it as to time. Yes or no?

A At one part of the meeting, yes.

C And did you hear people say they had made arrangements for the summer and some people say they had rented their homes? Did you hear that?

A I heard that the people made arrangements for tours and hotels in Europe.

Q Yes.

A Renting homes I don't recall.

C Now, Mr. Rothberg, how long were you there that night?

A Several hours.

C It was a very hectic meeting, was it not?

A It was.

C And your associate, Mr. Mindell, was also there?

A Yes.

C Now as a representative of the Attorney General's office

[Tr. 247]

of New York, the purpose of you being there was to see that there was no violation of law?

A I would not go so far as to say that was our purpose-- our purpose was--

Q To protect the public?

A -- an investigation which our office was conducting concerning Michael Friedman.

Q And, Mr. Rothberg, during the several hours that you and Mr. Mindell, your associate, were there, during this time did you see checks being handed up by the people in the group?

A Yes.

Q \$92. Did either you or Mr. Mindell at any time voice any protest? Yes or no?

A No.

Q Did either you or Mr. Mindell at any time during that meeting make any statements to any of the people, any of the teachers, any members of the group, telling them they should not issue these checks or pay this additional amount?

A We did not.

Q You did not.

You preferred to see that charter operated, did you not?

MR. STRAUS: Mr. Examiner, why do we have to know

[Tr. 248]

whether Mr. Rothberg to see the charter operate?

MR. BERKOWITZ: All right, I will withdraw it.

EXAMINER FREDRICKS: I don't see why.

Q You were concerned, however, that there be no stranding of a large group of people, were you not.

MR. STRAUS: Let's not have his opinion of whether he was concerned on the record.

EXAMINER FREDRICKS: Well, I think Mr. Berkowitz is entitled to develop why the Attorney General was participating in the meeting.

Q Is that so, Mr. Rothberg?

A Well, let me say this-

Q No, no. I would like you to answer my question, please, and not make any other statement at the moment.

EXAMINER FREDRICKS: He is entitled to state the objective in his own words, I am sure.

MR. BERKOWITZ: Yes, but he should answer my question. If he wants to make an explanation he may do so, but I would like it answered.

(Last question read.)

A We are concerned with the protection of the public.

Q Mr. Rothberg--

EXAMINER FREDRICKS: Now just a minute. The witness began his answer.

[Tr. 249]

MR. BERKOWITZ: He has answered.

EXAMINER FREDRICKS: Let him conclude his answer and then deal with it.

A (Continuing) We are concerned with the protection of the public in seeing that people aren't stranded, that flights take off that are paid for, and people are not defrauded.

Q Well, then did you think they were defrauded when they paid this \$92.20, whatever it was?

A At that time I did not know all of the facts.

Q What fact did you not know that you know now?

A I did not know about an agency agreement which existed.

Q Yes?

A About the payments that were made.

Q Yes. Did you make any inquiry at that meeting from the teachers or people paying the money?

A The teachers would not have that type of information.

Q That doesn't answer my question, does it, Mr. Rothberg? Did you make inquiry?

A No.

Now this affidavit that I read from, that was submitted in connection with the proceedings in Supreme Court, was it not? Do you recall reading this?

A No, I don't. Mr. Mindell in our office as I said,

[Tr. 250]

is handling this proceeding.

Q And do you recall Mr. Mindell making an affidavit in connection with those proceedings in which he in effect admitted that affidavit or stated in the affidavit that it was not the duty of the Attorney General to take action?

Can you remember that?

MR. STRAUS: Can Mr. Rothberg remember what Mr. Mindell admitted?

MR. BERKOWITZ: If he doesn't he can say so.

A I do not remember what is in the contents of that affidavit because, as I stated before, Mr. Mindell is handling that proceeding.

Q Very well.

Now, Mr. Rothberg, was your office called into this picture by the Civil Aeronautics Board?

A I don't follow your question.

Q All right.

Let me phrase it differently. Did your office begin its investigation as a result of a communication from the Civil Aeronautics Board?

A No.

Q Was this as a result of communications, inquiries and other information obtained from people who were in touch with your office?

A Consumers Complaint Bureau, office

[Tr. 251]

Q That's your office?

A The Consumer Frauds and Protection Bureau.

Q Your appearance here today is pursuant to a subpoena served by the CAB, that is, the Bureau of Enforcement?

A That's pursuant to the direction of my Bureau Chief.

Q Did you receive a subpoena?

A I believe he received a request from me-- the CAB.

Q My question was: Did you receive a subpoena?

A I did not.

Q So that your appearance here then was at the direction of your superior?

MR. STRAUS: Excuse me. Could we have the record show "Yes"?

EXAMINER FREDRICKS: Very well. If you will answer audibly, it will be clearer to everyone, I think.

THE WITNESS: Yes.

Q Now, Mr. Rothberg, I will be through very quickly.

Now Nelson GroupTravel Corp. made an assignment for the benefit of creditors, did it not?

A Yes.

Q And that was prior to the date of this meeting I

[Tr. 252]

am talking about?

A I do not remember.

Q But Nelson Group Travel Corp. did make such an assignment?

A They did.

Q And your office intervened in those assignment proceedings?

A We did.

Q And do you know that some moneys were collected by the assignee?

A I have informed the assignee has received some moneys.

Q And the newspaper reports were that the amount collected as about \$60,000. Is that approximately correct?

A I don't-- no, I don't know what the assignee has.

Q You wouldn't know what the amount is. You wouldn't say that's incorrect, though?

A I don't know.

MR. STRAUS: Mr. Examiner, may I interject here? I would like to know how this is related to the direct.

MR. BERKOWITZ: On that score I am making him my own witness.

MR. STRAUS: Well, could you declare him as your

[Tr. 253]

own witness, please?

MR. BERKOWITZ: On that subject only, and on the following question as well.

Q So that Nelson Travel Corp. is out of business?

A That's correct.

Q And Mr. Michael Friedman you know has been incarcerated as the result of conversion of funds, is that correct?

A That is correct.

Q So that he is out of business?

A Yes.

Q So far as New York State Teachers' Study Group has been concerned, an injunction order has been entered, has it not, against that corporation, enjoining it from engaging in this type of operation?

A Enjoining it from engaging in charter flight operations.

Q Yes, so they are out of the picture, correct?

A What do you mean when you say they are out of the picture?

Q Well, they cannot again enter into this type of transaction?

A That is correct.

Q And how about Sari Friedman? The same thing there?

A I believe so.

[Tr. 254]

MR. BERKOWITZ: All right.

No further questions.

MR. STRAUS: I would like to have some redirect, please. Can we go off the record a minute?

EXAMINER FREDRICKS: Off the record.

(Pause.)

EXAMINER FREDRICKS: On the record again.

REDIRECT EXAMINATION

By Mr. Straus:

Q You were asked on cross-examination, Mr Rothberg, something to the effect of weren't people waving checks in someone's face or whatever Capitol's counsel said?

You cannot say, can you, who these people were? Could not these people have been some of these other people, people from other than the July 1st charter, who nevertheless wanted to go on a charter because otherwise they would lose all their money?

MR. BERKOWITZ: I respectfully object to that question.

MR. STRAUS: This was opened on cross-examination.

MR. BERKOWITZ: That's argumentative, states certain matters in the record and states certain suppositions not included in the record.

EXAMINER FREDRICKS: What suppositions does it state not in the record?

[Tr. 255]

MR. BERKOWITZ: Couldn't this have been people who were not members of this group who were waving checks and so forth?

MR. STRAUS: I seriously doubt Mr. Berkowitz has a good objection because he brought this up and I am entitled to ask this question.

MR. BERKOWITZ: Not in that form.

EXAMINER FREDRICKS: I am inquiring into this, Mr. Straus. Now, I think it was developed that some of those attending were not people who had signed the July 1 London-Paris-Rome charter, but for other charters.

MR. BERKOWITZ: No, I have no dispute about that Mr. Examiner, but what I do say is that what counsel now is doing is making an argument based upon the testimony that it does not foreclose other possibilities, which may be so, but certainly it is something which this witness should not be permitted to speculate about unless he knows.

EXAMINER FREDRICKS: Well, are you conceding that the witness doesn't know who these people were?

MR. BERKOWITZ: Yes, of course.

EXAMINER FREDRICKS: And that for all he knows they may have been people who arranged for the July 1st charter or for another charter?

MR. BERKOWITZ: It's entirely possible.

[Tr. 256]

EXAMINER FREDRICKS: Allright. Doesn't that answer it?

MR. STRAUS: That answers my question

EXAMINER FREDRICKS: Very well. That will serve instead of an answer to the question.

Q Mr. Rothberg, also you were asked whether you or Mr. Mandell suggested that people should do certain things or whether you protested things that were occurring at the meeting?

What purpose would your protest of Mr. Mindell's protest have had at this meeting? Did you not tell them that they could file complaints at your office at some future date?

MR. BERKOWITZ: Just a moment.

MR. STRAUS: Shall I break it into two questions?

EXAMINER FREDRICKS: Yes.

What purpose would your voicing your protest have had at that meeting?

A This-

MR. BERKOWITZ: I object to that. Is that the question?

MR. STRAUS: Yes.

MR. BERKOWITZ: I object to that question on the ground that he is now asking for an opinion of the mind or having to do with purpose and the inclusion of

[Tr. 257]

That's not proper.

MR. STRAUS: Exactly the type of question Mr. Berkowitz was asking.

MR. BERKOWITZ: Two wrongs don't make a right.

MR. STRAUS: Well, if you will withdraw yours, I will withdraw mine.

Will you withdraw yours?

MR. BERKOWITZ: I don't intend to withdraw anything.

MR. STRAUS: Then I neither will withdraw it.

MR. BERKOWITZ: This is again a legal argument Counsel wants to argue his case in the form of alleged redirect.

MR. STRAUS: I am answering Mr. Berkowitz.

EXAMINER FREDRICKS: Go ahead and answer the question, please, Mr. Rothberg.

A Well, our purpose was to follow up in our investigation to have the teachers file complaints with us, and it is not to give legal advice to individuals.

In other words, we are not a law office which gives A, legal advice to an individual on his particular problem. It's the overall picture we are looking at.

Q From the events of the meeting which you attended, I understand to gather facts for your investigation, did these events cause you to speak several people who were there?

A Yes.

[Tr. 258]

Q Did you tell any of these people that they could file anything with your office at a future date?

A We told them they could file a complaint with us.

We examined some of the documents that they had received from the teachers' study group and from the travel agency.

Q Mr. Rothberg, you were asked by counsel for Capitol whether you wanted these people to go on the flight. Now as I understand your testimony you were concerned with protection of the public.

Am I correct in assuming that, as far as your position is concerned, you would not rather have them go on the flight more than their receiving the full amount of their money back?

In other words, was your job fulfilled, do you think, if the passengers were satisfied in some way?

MR. BERKOWITZ: That's objected to, if the Examiner pleases.

Frankly, I have some doubts if I understand the question fully. Again he is asking for the operation of the witness' mind.

I respectfully submit that the question is improper for a number of grounds.

MR. STRAUS: Mr. Berkowitz asked the witness--

EXAMINER FREDRICKS: As I see it, he is asking the witness to define the Attorney-General's objective in attending

[Tr. 259]

the meeting and interesting himself in the situation involved in the July 1 charter and other charters, on which money had been paid, but where there was at least doubt whether the charter would be performed.

MR. BERKOWITZ: Mr. Examiner, if the question were phrased in that form, I would have no objection.

MR. STRAUS: I will try to rephrase the question if that's all right with the Examiner

EXAMINER FREDRICKS: Yes, it's perfectly all right.

Mr. Berkowitz asked you whether you were not concerned that people should go on this flight?

My question is: Were you more concerned that people should go on the flight or more concerned that people should receive their money back?

A We were concerned that people who paid money for their flights-- and I emphasize the word flights because there were several-- should either go on their flights or receive their money back.

MR. STRAUS: I have no farther redirect.

RECROSS EXAMINATION

By Mr. Berkowitz:

Q Mr. Witness, you testified on redirect that the purpose of your attendance at this meeting was not to give advice to individual people, applicants, but you were concerned with the overall picture. Correct?

[Tr. 260]

A That is correct.

Q But on the other hand, if an infraction of the law should take place in your presence, would you then have a duty to act?

A If an infraction of law which we are aware of--
Yes.

A -- with which we have a power or some jurisdiction to handle, we would.

Q And would you say that, as this matter involved a question of an airline under the jurisdiction of the Civil Aeronautics Board and interpretation of tariffs, that this was a matter which the Attorney-General's Office in any event would have no jurisdiction over?

A I didn't-- I don't say we have no jurisdiction.

Q Do you think that you did?

A At that particular time we were conducting an investigation involving Michael Friedman.

Q That's what you were primarily concerned with?

A That particular time.

MR. BERKOWITZ: Yes, no further questions.

MR. STRAUS: I have one further question that was brought up on recross.

REDIRECT EXAMINATION

By Mr. Straus:

Q Mr. Rothberg, without preparation beforehand, would

[Tr. 261]

you have any knowledge of an infraction of Federal law?

A. I would not.

MR. STRAUS: Thank you.

EXAMINER FREDRICKS: Thank you, Mr. Rothberg.

You are excused.

MR. STRAUS: I would like to call Mr. Martin Festinger to the stand.

Whereupon,

MARTIN FESTINGER,

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Straus:

Q Will you state your full name for the record, please?

A Martin Festinger.

MR. BERKOWITZ: How do you spell that?

THE WITNESS: F-e-s-t-i-n-g-e-r.

Q Where do you live?

A 325 East 201st Street in the Bronx.

Q Mr. Festinger, are you, or rather were you a member on July 1, 1965, of the New York State Teachers' Study Group?

A Yes, I was.

Q Did you take a charter flight in 1965 with other

[Tr. 262]

members of this group and members of the family?

A Yes, I did.

Q Do you remember on what date the flight started?

A Yes, July 1, 1965.

Q Where did it go?

A It went to Rome.

Q And do you know what airline flew the charter?

A Yes, Capitol Airways.

Q The respondent in this case?

A Yes.

Q How did you first find out about the charter?

A It was advertised in my school.

Q Pardon me? In your school?

A Yes, the New York State Teachers' Group had a flyer.

Q And you are a teacher, of course?

A Yes.

Q How did you originally pay for the charter: By check, cash or what form?

A I made several payments by check and several payments by cash.

Q To whom were your checks made payable?

A To the New York State Teachers' Study Group.

Q Originally what did you understand the price to be per person for the charter trip that you finally went on,

[Tr. 263]

the original price?

A \$300.

Q Prior to the night of June 29, 1965, when there was a meeting of the passengers, what total amount had you paid for the charter transportation?

A I paid \$1200.

Q And this covered how many people?

A My wife and two children, and myself.

Q Do you have with you any cancelled checks?

A Yes, I have one (producing check).

MR. STRAUS: Mr. Examiner, I would like this marked for identification.

EXAMINER FREDRICKS: These will be BOE 108.

MR. STRAUS: Exhibit BOE 108.

(BOE Exhibit No. 108 was marked for identification.)

MR. STRAUS: Mr. Examiner, I would like to have marked for identification BOE Exhibit 109 a piece of paper which purports to be a receipt from the New York State Teachers' Study Group.

EXAMINER FREDRICKS: BOE Exhibit No. 109.

(BOE Exhibit No. 109 was marked for identification.)

Q Mr. Festinger, is your signature at the bottom of this check?

A Yes, it is.

Q Is the date which is on BOE 108, April 26, 1965,

[Tr. 264]

the date that you wrote this check.

A Yes, it is.

Q On the back of the check do you find an endorsement?

A Yes, I-- not an endorsement, a stamp.

Q Well, a stamped endorsement.

A Yes.

Q Which you recognized to be the endorsement that was on when you got it back from the bank?

A Bank.

Q Is this check, BOE Exhibit 108 an example of the payment you made to New York State Teachers' Study Group for the original charter price that you were to pay?

A Yes.

Q And Exhibit BOE 109, could you identify that, please?

A Yes. After I made the final payment it was, a statement was put on the original paper that we had, which had a list of flights, that I made a full payment of \$1200.

Q Who filled this out? Did you receive it in the mail or was it handed to you?

A I believe-- the last payment I think was in cash.
Mrs. Sari Friedman--

Q That's whom you received BOE 109 from?

A I believe so, that she put it, paid, either she or Mr. Friedman. I am not sure which.

[Tr. 265]

Q There are some notes on the back. Does this concern the receipt at all?

A No. No, that was just a--

Q As I understand it now, BOE 109 is receipt for payment in full for the charter of everyone of your family that was to be on the charter?

A Yes.

MR. STRAUS: Mr. Examiner, I would like to offer BOE 108 and 109.

MR. BERKOWITZ: No objection.

EXAMINER FREDRICKS: You are offering only the face of 109?

MR. STRAUS: The face only of 109 and the face and back of 108.

EXAMINER FREDRICKS: Yes, very good. They are received in evidence.

(BOE Exhibits 108 and 109 were received in evidence.)

Q Mr. Festinger, shortly before the date of the flight, did you receive notice of any sort concerning the charter flight?

A Yes. I received a telegram from Capitol Airways that the flight that I was concerned with would be in jeopardy unless some extra fees were paid and to appear at a hotel in Manhattan.

[Tr. 266]

MR. BERKOWITZ: I ask that that be stricken unless the witness produces the telegram.

Q My next question will be whether the witness has the telegram.

A I do have the telegram. My little girl took it as a souvenir and I looked for it extensively and I could not find it. I believe it's in the house.

MR. BERKOWITZ: I believe my position is clear. I certainly have no objection to testimony that a telegram was received, but I think this witness is honestly mistaken concerning the contents of the telegram. The telegram as I recall it--

MR. STRAUS: I can alleviate the problem. I understand. Mr. Berkowitz is perfectly right.

What I would like to do is have Mr. Berkowitz make an objection.

MR. BERKOWITZ: Yes.

MR. STRAUS: -- and after the record is completed and not closed, I would like to hold it up and submit the telegram, BOE-- we can assign a number.

MR. BERKOWITZ: I have no objection to that.

EXAMINER FREDRICKS: Very well. I understand you are objecting to the way he phrased the content of that.

MR. BERKOWITZ: The way he characterized the telegram, that portion.

[Tr. 267]

EXAMINER FREDRICKS: Very well. That portion where he stated the contents of it will be stricken and we will leave it to be completed by a telegram to be completed after the completion of the hearing.

Q Mr. Festinger, did you go to the meeting of the passengers of the New York State Teachers' Study Group charter?

A Yes.

Q And was it at the Shelton Towers Hotel, Lexington Avenue and 49th Street in New York City?

A Yes, it was.

Q This was the night of June 29, 1965?

A Yes.

Q Were other passengers at the meeting?

A Yes, many more.

Q Who spoke at this meeting?

A I believe the lawyer for Capitol Airlines. A Mr. Mitchell.

Q I would like to clarify this. A lawyer and Mr. Mitchell?

A Both. Both spoke.

Q In your own words, could you tell us? Well, I will say very briefly. I think we have been through this before. I just want a summary of what was said. I am not trying to cover up anything that was said. I just want a summary

[Tr. 268]

in your words of what was said at this meeting.

A Mr. Mitchell, I believe, spoke first and told, told the group that there has been a-- something arose during the-- at this flight where he had in the vicinity of \$20,000 and in order for this flight to take place there would be additional moneys forthcoming and it was estimated the 92.50 per passenger.

Q By forthcoming you mean that they had would need additional?

A You would have to give an additional 92.50 so that the flight can take place.

Q And you say Mr. Mitchell was the one who suggested that additional money be paid?

A Yes, he was.

Q Was any explanation made as to why Capitol had waited until June 29, I believe it was, to inform-- pardon me.

MR. STRAUS: Could we go off the record a moment?

EXAMINER FREDRICKS: Off the record.

(Discussion off the record.)

EXAMINER FREDRICKS: Do you want to reframe your question?

MR. STRAUS: I will reframe the question.

EXAMINER FREDRICKS: All right.

Q Do you remember at the meeting whether any explanation

[Tr. 269]

was made as to why Capitol had waited until the moment that they had waited to explain that there was a deficiency in funds?

A Mr. Mitchell stated that as far as he knew and as far as Capitol was concerned, that there was only one flight that had been partially paid for and that was the flight that was leaving July 1, and he had no record of any other flight because no moneys had been put down on any of the other flights, and all those people that were there that were on other flights shouldn't have been and that his questions and his statements were concerning just those people on that particular flight.

Q Did the amount which he mentioned earlier, which you say was \$20,000, change as the meeting went on?

A No.

Q Did anyone pay an additional amount?

A I recall that, what Mr. Mitchell said was that if you could give him a check at the latter part of the meeting he would accept it.

If not, come down to the office the following day and it would have to be the following day, so that everything, all the business of the flight, would be taken care of, and some people I believe did write a check at that meeting, the latter part of the meeting.

Q Did you pay at that meeting, or did you pay the

[Tr. 270]

additional \$92.50 per passenger at some other time?

A No, I paid the following morning the additional I should say a cousin of mine brought the money.

Q It was your money?

A It was my money, yes.

Q Did you pay by check?

A No, by cash.

Q You say you actually went on July 1, 1965 flight with other members of your family?

A Yes, sir.

Q For whom you paid. Has Capitol refunded the \$92.50 which you paid per passenger?

A No.

MR. STRAUS: I believe, Mr. Examiner, I have offered for evidence everything. There was a receipt and a check.

I am going to offer a telegram later for the record so I have no further redirect.

EXAMINER FREDRICKS: Very well. We will hold the record open for the telegram that you have related to Mr. Festinger's testimony.

CROSS-EXAMINATION

By Mr. Berkowitz:

Q Mr. Festinger, do you recall me at that meeting?

A Yes, I do.

Q And, perhaps, to refresh your recollection, didn't I

[Tr. 271]

speak first and say that Mr. Mitchell was expected shortly, he wasn't there when I spoke, he came in after me?

A Yes.

Q Because you testified that Mr. Mitchell spoke first, and I think you were incorrect.

The fact is that I spoke first.

MR. STRAUS: We will stipulate that he spoke first.

THE WITNESS: All right.

MR. STRAUS: And Mr. Festinger may not

Q Mr. Mitchell came in later?

A He came in later.

Q And you were in the meeting room itself or were out in the hall or the corridor near the elevators?

A No, I was in the meeting room itself during the entire time.

Q And you heard many teachers attempt to shout over others, to take the floor and discuss this?

A There was much disorder at that meeting.

I would say so.

Q Yes. Rather difficult. Do you remember me being up on a chair, being held by some people so I could be above the crowd so I could address them?

A Yes, I do.

Q And do you recall me saying to the assembled group that I was the local attorney for Capitol Airways and that

[Tr. 272]

Capitol was more concerned with the compliance, with its compliance and with the law, the tariff provisions, than it was with the difference in the money?

A I don't recall that, Mr. Berkowitz.

Q And do you recall my saying also among ther things, that under the circumstances, to avoid a tariff violation, in order to avoid such a tariff violation, that the flight would have to be cancelled and the moneys received by Capitol returned?

A No, I don't remember that.

Q You don't recall that.

Do you recall me stating in words or effect that, so far as Capitol is concerned, it wanted to do what was proper; it wasn't just money that was involved?

A I do remember you saying that the airline was concerned about doing what was proper.

Q That's right, and do you recall people, school teachers, making requests that the flight go on, offering to pay the difference and stating that they had made arrangements for the summer and made various plans?

A Yes, one individual stated that he had already rented his house and that it was imperative that he continue on his summer flight.

Q And did you see people as I got off the chair clutching me by my arms, stating, "We want the flight to go.

[Tr. 273]

We have made arrangements?"

A The room was very crowded. I don't remember them clutching you by your arm. However, there were many people around you.

Q Yes.

Now, may I ask you this: Do you recall me stating in effect that if Capitol would accept the difference, the balance that was unpaid, not received by Capitol, that the passengers or the charter group would then be relegated to their claims against Friedman, and that Friedman we believed to be financially responsible? Do you recall that?

A No, I don't.

Q Do you recall me stating that we believed that Friedman's corporation had made an assignment for the benefit of creditors?

A No.

Q Do you recall me saying that in such proceedings the chances of collection were rather remote and if the teachers proceeded, that I could not hold out much hope for collection on their part, words to that effect?

A Collection of the moneys that they paid for the flight.

Q That they previously paid which has not been turned over to Capitol?

[Tr. 274]

A Something to that effect, that they would lose the moneys that they had already given in.

Q Yes, and that their chances of collecting it back from Friedman were rather remote?

A Vaguely, I, I-

Q Yes, and do you recall now that I did talk about some proceeding for the assignment for the benefit of creditors?

A I don't recall that.

Q You don't?

A No.

Q But you recall that in connection with proceedings and claims by teachers against Friedman, that would be their remedy if they elected to pay Captiol the unpaid balance, something to that effect?

A Are you referring to the people that were on other flights?

Q No, on the July 1 flight.

A There was some statement made to the people on the other flights that their recourse would be--

Q Yes. Well, I am talking about people on the July 1 flight in connection with the pro-rated \$92 and change, that this would then enable or put the teachers in a position where they would then have claims against Friedman or Nelson Group Travel. Do you recall that?

[Tr. 275]

A For the 92.50. Yes.

Q Do you recall that?

A Yes.

Q And, therefore, by paying this additional amount they would, therefore, have these claims against Friedman and Nelson Group Travel, correct?

A Well, it would follow.

Q And I said so at the time? In substance?

MR. STRAUS: Well, we have the witness' answer already.

A I believe so, yes.

MR. BERKOWITZ: I have no further questions.

MR. STRAUS: I have some redirect.

REDIRECT EXAMINATION

By Mr. Straus:

Q Mr. Festinger, do you whether the persons that Mr. Berkowitz mentions, who allegedly were requesting that the flight operate, do you know whether they were July 1, 1965, passengers or, perhaps, could they be passengers who thought they should go on other flights who nevertheless wanted to go on some other flight?

A There was much, there was much talk by other people on other flights that the money that was put on this flight be distributed among all the people on all the flights rather than why should we be singled out, that they also were part of

[Tr. 276]

this group and that, just because it was a coincidence that the money happened to be put on our particular flight, why we should have the advantage and they should not have the advantage of a flight.

In other words, these people that were mentioned that were quotes pleading unquotes, could have been persons who never went?

A It's very possible.

Q And another question is, your occupation is, I understand, a teacher. It is not an attorney, and do you know what an assignment for the benefit of creditors is, or do you know what your legal remedies are for loss of money from your education?

A No, only that the District Attorney, the assistant Attorney General stated that we--

Q That you file complaints.

A That we file a complaint with his office.

MR. STRAUS: Thank you.

~~RE-CROSS-EXAMINATION~~

By Mr. Berkowitz:

Q Did you hear Mr. Mitchell when he came in and others with the teachers' request that people at the meeting who were not booked or scheduled before the July 1 flight please leave?

A Yes, but no one left.

[Tr. 277]

Q Yes, well, I think some did, but not too many.

A Not too many.

Q And a repeated request that all other people leave because this meeting was called solely and only for the July 1 flight?

A Yes, that was stated very emphatically.

Q Yes. In fact they were told that the meeting would be more orderly, that they were overcrowded and they didn't belong there?

A Yes.

Q And there were pleas made for them to leave many times?

A Yes.

Q And they were told whatever would be said in being addressed to these individuals who were on the July 1 flight?

A Yes..

MR. STRAUS: That's all.

EXAMINER FREDRICKS: You are excused, Mr. Festinger.

MR. STRAUS: I would like to call Mr. Louis Geller to the stand.
Whereupon,

LOUIS GELLER,

was called as a witness, and having been first duly sworn, was

[Tr. 278]

examined and testified as follows:

DIRECT EXAMINATION

By Mr. Straus:

Q Would you state your full name for the record, please?

A L-o-u-i-s, Louis Geller, G-e-l-l-e-r.

Q Where do you live, Mr. Geller?

A 103-33 65th Road, Forst Hills, New York.

Q Are you a member or were you a member on July 1, 1965--

A My daughter, my daughter is a teacher and we were allowed.

Q You are parents of a member of the New York State Teachers' Study Group?

A That's right.

Q What was your daughter's name?

A Irene Geller.

Q Did you take a charter flight in 1965 with members of this group and members of their families?

A Yes.

Q What date did the flight start?

A July 1, 1965.

Q Where did it go?

A It went to Rome via Paris and returned via Paris.

Q Do you know the airline that flew the charter?

[Tr. 279]

A Capitol.

Q How did you find out about the charter?

A Through my daughter.

Q Who paid? Did you pay for this?

A I paid for this.

Q For your daughter, yourself and your wife?

A The three of us, yes.

Q And how did you originally pay for the trip?

A Checks.

Q To whom were the checks made payable?

A New York State Teachers' Study Group.

Q Now originally prior to June 29, 1965, what did you understand to be the charter price per person?

A \$310.

Q What total amount did you pay for the charter transportation prior to June--

A \$930.

Q This is prior to June 29th?

A That's right.

Q I am sorry. I missed that amount.

A \$930.

Q Do you perhaps have any cancelled checks with you?

A We haven't with us, but I could get them here if it's so required.

[Tr. 280]

Q Shortly before the date of the flight, Mr. Geller, did you receive a notice of any sort which concerned the flight?

A On June 29 in the morning we received a telegram telling us to come down to a hotel in downtown New York-- Shelton, I believe it was-- Lexington Avenue--and that the flight was in danger of not-- because of non-payment.

Q Well, you did receive a notice. Do you have a copy of the notice that you received?

A No I saw an exact copy. The man over there has it.

Q Well, if possible--

A No, I threw it away that same day. I didn't know there would be a trial and the evidence would be needed.

MR. BERKOWITZ: Mr. Straus, could we have the same stipulation, that the testimony by the witness of his recollection of what was in the telegram be stricken and that you intend to submit the telegram?

THE WITNESS: No, I will see that telegram over there and I will say that's an ident copy of the telegram.

MR. BERKOWITZ: No. This is a technicality on the question of evidence. We are not disputing what you saw.

MR. STRAUS: Mr. Examiner, could we for the moment have this statement stand? The telegram is going to show up, not his telegram, but the telegram is going to show up, unless

[Tr. 281]

Mr. Berkowitz says all these telegrams were different.

MR. BERKOWITZ: Oh, no.

EXAMINER FREDRICKS: Mr. Geller says he threw away his telegram.

THE WITNESS: No, but I saw an identical copy over there and I will say it's the same, and I am sane.

EXAMINER FREDRICKS: I don't think there is any question about that. We are talking about more than one form.

THE WITNESS: I will sign my name on it saying that that's an ident copy that I received. There shouldn't be any question that I received it.

EXAMINER FREDRICKS: All right, Mr. Geller. Counsel has heard your offer and, if they want to avail themselves of it, they will tell you so.

Q On June 29, 1965, which was the meeting date-- it was at night-- were there other persons at the meeting?

A Hundreds.

Q Do you know who spoke at the meeting?

A Yes, sir. This gentleman, and then I believe it was the other one over there. I am not sure. But there was a Mr. Martin.

Q Mitchell, perhaps?

A Mitchell or something. He came in from the airplane company and was late, and it was very hot and we were

[Tr. 282]

very angry that he didn't come sooner.

MR. BERKOWITZ: When this gentleman said "This gentleman," he pointed to myself.

THE WITNESS: Yes, you were there early.

MR. STRAUS: That's Mr. Berkowitz, for the record.

Q Could you tell me in a brief manner what the passengers were told at the meeting?

A They were told that the balance of the money was not received and we would have to pay over a hundred dollars more per passenger, and later that figure was reduced.

Q To what?

A To 92.50 a passenger.

Q It was reduced to 92.50?

A 92.50.

Q And do you remember who suggested that extra money be paid?

A I think it was Mr.--

Q Mitchell?

A Mitchell from Capitol.

Q Did anyone who spoke at the meeting explain why they had waited until June 29 to inform the passengers of the deficiency?

A Well, they said something about that they-- another travel agent didn't get money for a Japanese flight, to fly

[Tr. 283]

across the country to the West Coast and when that money didn't show up then they first woke up that their moneys were missing.

Q Did anyone at the meeting pay additional amounts?

A Yes.

Q Did you pay the additional amounts?

A Yes.

Q How much was it?

A 92.50 apiece.

Q And do you have this check with you at all?

A It's at home.

Q At home also?

A I will have it over here if you--

Q To whom was the check made payable?

A Also to the-- that last check, I am not sure who I made it payable to, but it's written down on the check.

My wife might remember.

MRS. GELLER: Capitol.

THE WITNESS: To Capitol.

MR. BERKOWITZ: This was stated by the witness' wife, now in the room.

Q Well, did that refresh your recollection?

A Yes..

Q All right. It was paid to Capitol and you actually went on the July 1, 1965 flight?

[Tr. 284]

A Yes, three of us went.

Q Has Capitol refunded the 92.50 per passenger to you?

A No.

Q Or to your daughter?

A No.

Q Or to your wife?

A Nobody.

MR. STRAUS: I would like preliminarily, Mr. Examiner, if we decide to put these checks in evidence, to have the right to submit them as future exhibits.

MR. BERKOWITZ: All right.

EXAMINER FREDRICKS: Very well. Mr. Berkowitz is agreeable to that and the record may be held open so that you may have the opportunity, the option.

MR. STRAUS: I have no more direct.

EXAMINER FREDRICKS: Off the record.

(Discussion off the record.)

MR. STRAUS: I have no further direct.

CROSS-EXAMINATION

By Mr. Berkowitz:

Q Mr. Geller, what business are you in?

A I am retired.

Q What business had you been in?

A I was a wholesale dealer in paper and laundry

[Tr. 285]

supplies and dry cleaning supplies.

Q And are you angry with me because I made that objection previously?

A Well, I thought you were sort of picayunish about something. Didn't really make much sense. You knew I received a telegram and I showed you a copy and I told you.

Why do you bring it up, the talk?

Q You heard the previous witness make testimony concerning statements I made?

A Yes, sir.

Q Were you in that room, were you inside the room, the main room?

A I told you to take your coat off, it was making me hot.

Q I was sweating profusely?

A That's right, and I sympathized with you.

Q Do you recall me telling the people at the meeting that we were more concerned with the question of law and tariff compliance than we were with the question of the difference in money?

A You were very concerned that Capitol be protected and not do anything illegal. That seemed to be very much on your mind.

Q Yes, I said that that was much more important than

[Tr. 286]

the difference in the money, isn't that correct?

A Or the convenience, or anything else. That was your main concern.

Q Obviously.

A That's right.

Q And I said that we could cancel the flight and could return--

A I don't recall that.

Q And do you recall some of the people saying in effect, "Please don't. Let us pay the difference. We made arrangements for the summer"?

A Some people were very upset at being gravely inconvenienced, hotel arrangements and their cars and they didn't have any place to sleep in the city and they pleaded. I remember that.

Q They pleaded?

A There was great concern.

Q Now you were asked by counsel, did Capitol ever refund this \$92.50?

A No.

Q Now, as a matter of fact, Mr. Geller, at the time of this meeting you had the option of either paying that amount or not and you, therefore, never made any claim for refund, did you?

A No, but it seemed it was generally in the air at

[Tr. 287]

the meeting--

Q Yes.

A That, if I don't pay that 92.50, I would lose everything; I wouldn't get anything back.

Q Oh, no, Mr. Geller.

A Oh, yes, in fact it was surprised that some people let all their money go and--

Q Mr. Geller.

A -- and that hurt.

Q May I ask you, please: Do you recall me saying in substance that in order to avoid any question of a possible tariff violation, that I was inclined to recommend that the flight be cancelled and the moneys already received by Capitol would be distributed and returned pro-rata?

A I stepped out for a short time. My wife is here. She might remember. She didn't step out at all.

But that part I don't remember. I really don't.

Q It was a very hectic meeting in any event?

A It was very hard to hear anything, what anybody said.

Q And I was up on a chair?

A I recall that.

Q Above the crowd and teachers were shouting me down and eventually Mr. Mitchell came into the room and it was quite some time later?

[Tr. 288]

A Yes. He came much too late.

Q And I was trying to get some protection. I looked exhausted?

A Yes.

Q And you felt sorry for me?

A I did.

MR. BERKOWITZ: All right. Thank you. That's all.

MR. STRAUS: I have a few questions on redirect.

REDIRECT EXAMINATION

By Mr. Straus:

Q Mr. Geller, again, pleading persons were mentioned. Could these persons who were pleading, with whomever they were pleading, have been from groups not concerned with the July 1st flight as far as you know?

Could they have been the persons also--

A It could have been from other flights.

Q And as a practical matter-- now, this is solely your understanding as a layman to the law-- as a practical matter did you have any true option to pay or not to go in your own mind, or did you have to pay because you would lose everything else?

A I would lose everything else if I didn't pay. I did not have it-- if I did not pay the extra 92.50 I would get nothing back. That was the impression I had.

[Tr. 289]

Q And the suggestion that you pay the 92.50 came from Capitol Airways?

A That's right. Originally they asked for a larger sum, but they reduced it to 92.50.

Q But it changed as the meeting went on?

A Yes.

MR. STRAUS: I have no further redirect.

RECROSS - EXAMINATION

By Mr. Berkowitz:

Q Yes, but don't you recall that the people who were at the meeting who had not been scheduled for the July 1st flight were asked to leave?

A Very many.

Q Very many times?

A Very many times. Yes.

Q They were begged and requested to leave?

A That's right.

Q Weren't they told that the remarks that were made were not addressed to them?

A They were told that they had no business being there.

Q Yes. So, therefore, any discussion concerning additional amounts was not addressed to these people who were asked or told to leave?

A It was addressed only to the flight that I was on.

[Tr. 290]

That's the understanding that I got.

Q And these people who offered these checks, do you recall people holding up checks in their hands?

A Well, there was money being given. I wanted to pay. But I don't recall from what flight they were from.

Q Perhaps I can refresh your recollection.

A Yes. But I don't recollect. I didn't go around asking which flight you were on. I think this is somebody else's business.

Q Perhaps I can clear it up. Before Mr. Mitchell got there I spoke first, correct?

A Yes.

Q And before Mr. Mitchell got there, there was some talk of how much the difference in balance was per passenger.

I say before he got there, while I was talking, didn't people hold up checks?

A I don't recall that, really.

Q And do you recall my saying anything at all whatsoever about the cancellation of the flight because of the question of possible tariff violation?

A See-- somebody was there from the Attorney-General's office and permitted you to take that money.

MR. BERKOWITZ: All right, that's all.

MR. STRAUS: Just wait just a second.

REDIRECT EXAMINATION

[Tr. 291]

By Mr. Straus:

Q Mr. Geller, could you very briefly explain what you mean by "permitted them to take the money"? The Attorney-General didn't have any power over it.

A I don't know if it was the Attorney-General. There was somebody other than this gentleman.

Q Could it have been a Capitol representative?

A Well, yes. First he didn't even want to take the checks because they weren't supposed to deal with us but through a group.

Q But they accepted your money directly nevertheless?

A That's right, because it had to be done immediately because the flight was there and--

MR. STRAUS: All right. Fine. I am through.

EXAMINER FREDRICKS: You are excused, Mr. Geller.

MR. STRAUS: I wonder if we could have a short, say, five or ten-minute recess.

EXAMINER FREDRICKS: We will take a 10-minute recess at this time.

(Recess.)

EXAMINER FREDRICKS: Let us please come to order

MR. STRAUS: I would like to call Mr. Sid Neschis to the stand.

Whereupon,

SID NESCHIS,

[Tr. 292]

was called as a witness, and having been previously sworn,
was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Straus:

I guess that is sufficient for stating your
full name for the record?

A Sid Neschis.

Q And you live where?

A 1730 Montgomery Avenue, Bronx, New York.

Q On July 1, 1965, were you a member of the New York
State Teachers' Study Group?

A Yes, I was.

Q Did you take a charter flight in 1965 with other
members and members of their families and perhaps your
family?

A I did.

Q On what date did the flight start?

A On July 1st.

Q And where did it--

A 1965.

Q '65, and where did it go?

A First to Paris and then to Rome.

Q Do you know the airline that flew the charter?

A Capitol Airways.

Q How did you find out about the charter?

[Tr. 293]

A I had been a member of the New York State Study Group before.

Q Did you receive documents of any sort telling you about--

A I received fliers and announcements of their meetings.

Q Do you have any examples of these documents with you?

A Yes, I do.

Q How about the latest flier?

A Well, '65, it called the flights for 1965.

Q Do you have any document that mentions only the July 1st flight?

A Only the July 1st, no. All the documents included all the flights.

MR. STRAUS: Mr. Examiner, I would like to have this marked for identification as BOE Exhibit 110.

EXAMINER FREDRICKS: It is so marked.

(BOE Exhibit No. 110 was marked for identification.)

Q Mr. Meschis, BOE Exhibit 110, which I present you now, is an example, you say, of the type literature that you have concerning the flight you are to go on?

A That's right.

Q And you received this how? In the mail?

A In the mail, direct from the director of the

[Tr. 294]

flight.

Q Which was--

A Mrs. Sari Friedman.

Q And I assume you know the contents of it?

A Yes, sir, I circulated it to my friends.

MR. STRAUS: I would like to offer BOE Exhibit 110 in evidence.

MR. BERKOWITZ: Mr. Examiner, I notice that the proposed exhibit refers to various flights, Greece, Israel, Turkey, and in other words, it has to do with many flights with which we were not concerned.

In so far as it is limited to the July 1st flight, I have no objection.

EXAMINER FREDRICKS: I assume that that's the only purpose for which you are offering it.

MR. STRAUS: I am merely entering it to show an example of advertising.

EXAMINER FREDRICKS: Yes. BOE 110 is received in evidence.

(BOE Exhibit 110 was received in evidence.)

THE WITNESS: Excuse me. I also have-- you asked me if I have others. I have a pre-flight meeting and it states four other flights to come in.

Q Well, I think this is sufficient. Just to show that you received advertisements.

[Tr. 295]

A All right.

Q How did you originally pay for the transcript?

A I paid by check, bank check three times.

Q Bank check, you mean cashier's check or your own personal check?

A No, cashier's check. I am sorry. I said three. I had to pay four payments to Capitol to complete it.

Q These were all cashier's checks?

A Yes.

Q Do you have a receipt for each check?

A Yes.

MR. BERKOWITZ: We don't dispute that this witness paid what he said he paid.

Q To whom were the checks made payable?

A Three to the New York State Teachers' Study Group and the fourth payment to Capitol Airways.

Q And originally how much did you understand the price of the charter to be, the total price per person?

A The total price was \$310 per person and on my final payment I list this as final payment for the flight on the third check when it was due-- they were due periodically and on the fine-- on the third check I wrote down "final payment for the flight" on the back of the check and-- which I thought would be the final payment.

Q Shortly before the day of the flight did you receive

[Tr. 296]

some sort of notice which concerned the flight?

A I did. I received a telegram notifying me that the flight was in jeopardy and unless there was-- due to non-payment for the flight.

I called Capitol's office and spoke to the young lady that was at the telephone and I asked her, I asked her directly what did she mean by "in jeopardy."

MR. BERKOWITZ: I object.

THE WITNESS: Excuse me. I am not--

MR. BERKOWITZ: Just a moment. I will object to any testimony as to an unidentified person on a telephone as not being binding on Capitol.

MR. STRAUS: There are only two people involved and this is the only other person. This is just entered for the purpose that he heard the information he is going to give over the telephone.

A (Continuing) I asked what did she mean by "in jeopardy".

She said "You are a school teacher. You know what jeopardy. If you don't pay you are not flying," and she hung up.

She was rather coarse and abrupt and direct and I didn't get a chance to find out.

They had asked me to contact. I should contact the offices of my group, which I tried, and I was unsuccessful.

[Tr. 297]

MR. BERKOWITZ: Mr. Examiner, I move to strike that portion of the answer which has to do with characterization of what this female said to him and characterization of her being rude and so forth and so forth; also that portion in which he was told by an unidentified female over the telephone.

MR. STRAUS: That's all right.

EXAMINER FREDRICKS: Now I understood you by a nod, Mr. Straus, to assent to the striking of the characterization.

MR. STRAUS: I am going to get it another way.

EXAMINER FREDRICKS: I beg your pardon?

MR. STRAUS: I am going to bring it out again, if you want to make an objection. I think it merely shows the impression Mr. Neschis got over the phone.

MR. BERKOWITZ: I would rather eliminate it, because I don't think it is proper.

EXAMINER FREDRICKS: I don't think the impression is essential to our purposes here. I don't think it bears on the question of violation one way or the other.

All right. The characterization will be stricken.

Now you object to the telephone conversation and Mr. Straus, I understand, doesn't oppose striking that also.

MR. STRAUS: Well, except that there was a telephone conversation.

[Tr. 298]

MR. BERKOWITZ: That I will concede; there was.

EXAMINER FREDRICKS: All right We will strike out so much of the answer as relates what the other person on the other end of the phone answered.

MR. BERKOWITZ: Yes.

Q And you say you have a copy of the telegram you received?

A I don't have a copy. I have the telegram I did receive.

Q The telegram itself?

A Right.

MR. STRAUS: All right.

Mr. Examiner, I would like this marked as BOE Exhibit 111 for identification.

EXAMINER FREDRICKS: It is so marked.

(BOE Exhibit No. 111 was marked for identification.)

MR. BERKOWITZ: No objection.

EXAMINER FREDRICKS: I understand you offer it in evidence.

MR. STRAUS: Under those circumstances, yes

MR. BERKOWITZ: No objection.

EXAMINER FREDRICKS: Yes. BOE Exhibit 111 is received in evidence.

(BOE Exhibit No. 111 was received in evidence.)

Q Mr. Nasch's, we have BOE Exhibit 111 in evidence now

[Tr. 297]

MR. BERKOWITZ: Mr. Examiner, I move to strike that portion of the answer which has to do with characterization of what this female said to him and characterization of her being rude and so forth and so forth; also that portion in which he was told by an unidentified female over the telephone.

MR. STRAUS: That's all right.

EXAMINER FREDRICKS: Now I understood you by a nod, Mr. Straus, to assent to the striking of the characterization.

MR. STRAUS: I am going to get it another way.

EXAMINER FREDRICKS: I beg your pardon?

MR. STRAUS: I am going to bring it out again, if you want to make an objection. I think it merely shows the impression Mr. Neschis got over the phone.

MR. BERKOWITZ: I would rather eliminate it, because I don't think it is proper.

EXAMINER FREDRICKS: I don't think the impression is essential to our purposes here. I don't think it bears on the question of violation of the law.

All right.

Now

Mr. Straus, I

conversation

[Tr. 298]

MR. BERNOWITZ: That I will concede; there was.

EXAMINER FREDRICKS: All right. We will strike out so much of the answer as relates what the other person on the other end of the phone answered.

MR. BERNOWITZ: Yes.

Q And you say you have a copy of the telegram you received?

A I don't have a copy. I have the telegram I did receive.

Q The telegram itself?

A Right.

MR. STRAUS: All right.

Mr. Examiner, I would like this marked as DOE Exhibit 111 for identification.

EXAMINER FREDRICKS: It is so marked.

(DOE Exhibit No. 111 was marked for identification.)

MR. BERNOWITZ: No objection.

EXAMINER FREDRICKS: I understand you offer it in evidence.

MR. STRAUS: Under those circumstances, yes.

MR. BERNOWITZ: No objection.

EXAMINER FREDRICKS: For DOE Exhibit 111 it received in evidence.

(DOE Exhibit 111 was received in evidence.)

Q MR. WATSON:

[Tr. 299]

and we can easily tell by reading BOE 111 what it says.

Now as a layman what impression did you get from BOE 111 and whatever conversations--ⁿ don't tell us what the conversations were, but what impression did you receive from all the communications, including BOE 111, as to your status with this charter flight?

MR. BERKOWITZ: Now just a moment, Mr. Neschis, please.

I object to that on the ground, Mr. Examiner, that the telegram, BOE 111, speaks for itself-- it is in evidence-- and that the witness' mental operations, what impressions he got, would not be proper evidence; it would be improper.

EXAMINER FREDRICKS: Why is it material for us to know what impression was created by this telegram, Mr. Straus?

MR. STRAUS: I will withdraw the question.

EXAMINER FREDRICKS: Very well. The question is withdrawn.

Q Did you go to the meeting to which you were told to go of the New York State Teachers' Study Group?

A Yes, I did.

Q And it was where?

A The Sheraton Hotel.

Q Shelton Towers perhaps?

[Tr. 300]

A Shelton, that's right.

Q Lexington and 49th Street?

A 545.

Q June 29th?

A June 29th.

Q 1965?

A Yes.

Q Were there other persons present at the meeting?

A Yes.

Q Did anybody speak?

A Yes.

Q Who spoke?

A Mr. Berkowitz spoke, Mr. Mitchell spoke, and a few hundred people spoke.

Q Will you tell us in your words what was said to you as a passenger at the meeting?

A There was no-- the final payment which was due, I think, six weeks before the flight, did not come through, and that if we didn't make up the difference, the flight would be cancelled.

Q And--

A And people were told, other people were told that Capitol had no record of their flights at all.

Q Well, you say Mr. Mitchell was the one that suggested that you pay the extra money?

[Tr. 301]

A Both gentlemen stipulated such that evening.

Q Was there any explanation made as to why Capitol waited until June 29 to inform you?

A I do not know why they waited this long. If I understand, the contract, the-- our group should have been informed or there's-- if there's a non- -- if the final payment is not made, that there's a cancellation.

I believe this is in the contract. If I am wrong, please correct me.

Q Did anyone pay the additional amount?

A I paid the additional amount, and I believe a hundred people, a hundred others did as well.

Q And it was 92.50?

A 92.50 per person.

Q And of course this was payable to whom?

A To Capitol Airways which I paid the following day.

Q And you actually went on the July 1, 1965, flight?

A Yes, I did.

Q And have they refunded the 92.50 per passenger to you for whomever you paid for?

A No, I went to the office and I asked them about this and they told, they said that my argument was with Michael Friedman, not with them.

And I said I made the final payments and this was it.

[Tr. 302]

Mr. Mitchell's office. There was a younger fellow in his office as well. Both were present.

MR. STRAUS: I have no more direct.

CROSS-EXAMINATION

By Mr. Berkowitz:

Mr. Beschis--

A Yes, sir?

Q You stated that both I spoke and Mr. Mitchell spoke?

A That is correct.

Q You were present in this room when I asked questions of the previous witnesses?

A Yes, I was.

Q And you heard me ask them about a statement which I made at the meeting and I was concerned primarily with the question of the possibility of a tariff violation in the event the balance was not collected for this flight?

A I heard you make the statement at-- today, right. You made the statement to the previous witnesses, yes.

Q Yes.

Do you recall some such similar statement, not perhaps in that exact language, at this meeting?

A You will have to change the language when you say tariffs and so on.

Q Or violation of law, that I was concerned with the possibility of a violation of law by operating this flight

[Tr. 303]

without collecting the balance of the charter?

A There was much said that evening.

Q Yes, but along those lines; did I make such a statement?

A When you say along those lines, we spoke of violations, we spoke of extra moneys that was necessary for the flight to continue, to take place.

Q Now, Mr. Neschis, I think you said that both Mr. Mitchell and I spoke about the charter members paying a balance of 92.00 and some odd dollars.

Isn't it true that I said nothing about such an additional payment but this was a discussion after Mr. Mitchell came in which was subsequent to my statement?

A You are asking me at what time of the evening this was said?

Q Yes.

A It was said during that evening.

Q Yes, but it was said after I had spoken?

A You spoke several times, both of you who took turns speaking to the group, answering questions.

Now are you asking me whether it was before or after or--

Q Well, perhaps I can clarify it this way: Do you recall that when I first spoke up I got up on a chair or something to be above the crowd?

[Tr. 304]

A I remember you standing on the chair.

Q And remember also during the time that I was standing on this chair I said something to the effect that Capitol being concerned with a violation of law if it should operate the flight without collecting the balance?

A I got the impression you were concerned about the flight. Whether you were standing on the chair or the floor, I don't think that's important.

Q And isn't it true that after I got off the chair and after a lot of questions had been asked, I then went out of the room?

A Whether you left the room at any time, I do not know. There was quite a crowd. I was present all the time in the room.

Q You were in the room itself?

A Right.

Q And after I had spoken and stopped answering questions, then Mr. Mitchell came in and spoke to the crowd?

A You spoke first, Mr. Mitchell followed and you both spoke again, whether-- I don't--

Q Do you recall that or is it somewhat--

A You spoke quite a bit that evening. I wouldn't say that you didn't speak after.

I would say you spoke again after Mr. Mitchell. Mr. Mitchell did not have the last word that evening.

[Tr. 305]

Q I think you are mistaken, Mr. Witness.

A I believe you are, sir.

Q Mr. Neschis, you took the flight?

A Yes, sir.

Q And were satisfied with the flight?

A We got back safely, yes.

MR. BERKOWITZ: All right. I have no further questions.

MR. STRAUS: I have no further questions.

EXAMINER FREDRICKS: You are excused, Mr. Neschis.

MR. STRAUS: Mr. Examiner, I would like to recall for a moment, Mr. Festinger, for a few questions.

It will probably clear up the question of the telegram.

MR. BERKOWITZ: Mr. Straus, do you have a similar one?

MR. STRAUS: Yes.

MR. BERKOWITZ: All right. I will say so.

MR. STRAUS: Mr. Berkowitz will stipulate that he received this.

MR. BERKOWITZ: A similar telegram.

MR. STRAUS: The only difference between the name and address.

MR. BERKOWITZ: Yes, sir.

EXAMINER FREDRICKS: Very well. Does the record show

[Tr. 306]

clearly what the stipulation is?

MR. STRAUS: All right.

As I understand it, the stipulation between myself and, well, between the Bureau and Capitol Airways is that Mr. Festinger received the same telegram as BOE 111 except that it had Mr. Festinger's name on it and Mr. Festinger's address on it, and I would imagine if Western Union has any special notes because they sent it to someone else, it would be different, too, but the substance of the telegram is the same.

EXAMINER FREDRICKS: Is that stipulation correct?

MR. BERKOWITZ: Yes. Yes.

EXAMINER FREDRICKS: Very well.

The record so shows.

MR. STRAUS: Could we also stipulate that this was the telegram that was sent out to all the July 1st passengers?

MR. BERKOWITZ: I would assume so, yes.

MR. STRAUS: Well, then we needn't call Mr. Festinger.

I would like to call Mr. Harry Brecher.

Whereupon,

HARRY H. BRECHER,

was called as a witness, and having been first duly sworn, was examined and testified as follows:

[Tr. 307]

THE WITNESS: My name is Harry H. Brecher, B-r-e-c-h-e-r. I reside at 700 Ocean Avenue, Brooklyn, New York.

DIRECT EXAMINATION

By Mr. Straus:

Q Mr. Brecher, were you a member on and prior to July 1, 1965, of the New York State Teachers' Study Group?

A Yes.

Q And did you take a charter flight in 1965 with other members and members of their families?

A Yes.

Q And the flight started on July 1, 1965?

A It did.

Q And where did it go?

A It went to Rome via Paris and returned from Paris on September 3.

Q The airline was Capitol Airlines?

A Capitol Airways.

Q How did you find out about the charter?

A There were fliers which were sent to my school I then displayed and joined the charter flight as a member.

Q And you originally paid for the charter in what manner?

A I paid with a personal check which unfortunately I am not able to locate as yet.

[Tr. 308]

Q And to whom was the check made payable?

A New York State Teachers' Study Group.

Q What was the total price that you originally understood the charter to be, for the charter?

A \$620 for the two passages.

Q \$310 each?

A Yes.

Q What total amount did you actually pay for the charter transportation prior to June 29, 1965?

A 625 for the two seats.

Q And shortly before the date of the flight did you receive some notice concerning the charter?

A Well, I received informal notice from a friend who told me that this charter was in trouble.

Q Did you receive notice to go to a meeting?

A Yes, I-- well, when I got this notice I started to making inquiries and including a call to the District Attorney.

It is from the District Attorney that I heard that they were going to send out telegrams and when we called Capitol Airways they so advised us.

I also made inquiries with other people, and I don't know whether it will be important to you to know this, but I made inquiries with a travel agent with whom I dealt in the past.

[Tr. 309]

This travel agent advised me not to pay any more money.

MR. BERKOWITZ: Just a moment.

EXAMINER FREDRICKS: Just a moment.

MR. BERKOWITZ: Just a moment. I object to the conversation with some third party not in the presence of Capitol as not being binding on Capitol.

EXAMINER FREDRICKS: Yes, if you will confine your statement to answering the question.

THE WITNESS: All right. Fine.

Q Then did you actually go to a meeting?

A Yes.

Q On the night of June 29, 1965, at the Shelton Towers Hotel, Lexington Avenue and 49th Street in New York City?

A Yes, I did attend that meeting.

Q Other persons were present?

A Yes, some few thousands it seems.

Q Who spoke at the meeting?

A Who spoke?

Q Well, did representatives of Capitol speak at the meeting?

A Yes, I recall counsel being there and I recall Mr. Mitchell and another gentleman came in later. I don't know his name. He was reputedly-- a vice-president of the

[Tr. 310]

company? There was a third representative.

Q Can you tell me briefly what was said at the meeting?

A Well, Mr. Berkowitz was careful to outline the situation and describes several of the alternatives as he viewed them, including that the flight might not go and the obligation of the airways to obey the regulations of the CAB and our recourse to Mr. Friedman for the lost money, I recall that.

I do not recall any-- his saying that we had the option on not paying and still going. This I definitely do not recall.

Q In other words, you understood that if you wanted to get quotes your money's worth unquotes and not lose the money you put into it, you would have to pay more?

A There was no such option indicated to anybody at that meeting, and I pointedly asked Mr. Mitchell later, do I have to pay this, and he said, "You have to pay it if you want to go."

I might also tell you-- well, I don't know if you, counsel might object to my statement. It is a fact that there were people from other flights who showed at this meeting and two of those people were on the plane when it took off and were recruited on the evening before the plane took off. They came there without luggage. I don't

[Tr. 311]

recall their names, but there isn't any doubt in my mind that I could not have gotten on that plane without paying the 92.50.

MR. BERKOWITZ: Now I move to strike out the portion of the answer which was obviously not responsive, the gratuitous statements of the witness about other people who were not originally booked on this flight, who got there without luggage and so forth.

MR. STRAUS: Well, if it is restricted to that one statement, all right.

THE WITNESS: I was asked to tell what I recall at the meeting.

MR. BERKOWITZ: Just at that meeting.

A (Continuing) I would say there were people on that flight who were not on this manifest.

Then I will also state that Mr. Mitchell spoke to us and said that 25,000 approximately had been paid for this flight of an obligation of \$52,000, approximately, that was the obligation of the New York State Teachers' Study Group, and that the difference would have to be made up excepting that they would eliminate the commission due Mr. Friedman since he was no longer a party to this.

MR. BERKOWITZ: Now I didn't want to interrupt the witness. May I have a ruling on my motion to strike?

EXAMINER FREDRICKS: You want to strike so much of

[Tr. 312]

Mr. Brecher's statement as reports his observing people who were on other flights in attendance at this meeting?

MR. BERKOWITZ: Yes, your Honor.

EXAMINER FREDRICKS: And such people, some of them boarding the July 1 flight?

MR. BERKOWITZ: Yes.

MR. STRAUS: Well, I agree. I think Mr. Berkowitz is correct about the two other people bringing luggage that went on the flight.

But I think Capitol admits that there were other people at this meeting.

MR. BERKOWITZ: Let's not confuse the issue. The point is that the question to this witness was to describe what took place at this meeting and he did, and then he went off on to the next thing which I think was not responsive and was not, I think, a proper answer to this question.

He volunteered many things which may or may not be so, which he observed. I ask that portion be stricken.

MR. STRAUS: It is rather technical. It is all right with me.

EXAMINER FREDRICKS: That portion is stricken.

THE WITNESS: And shall I continue with my recollection of the meeting?

[Tr. 313]

MR. BERKOWITZ: Please, Mr. Witness.

EXAMINER FREDRICKS: Just a moment. Wait for another question.

Mr. Straus will bring out whatever is pertinent in that connection.

Q Did anyone pay the additional amount, the additional \$92.50 per person that was requested by Mr. Mitchell?

A Many people did, I among them.

Q You paid it also?

A (Witness nods head.)

Q Did you pay it by check?

A I paid it by personal check.

Q Do you have a copy at this time?

A Not at this time.

Q That's right.

You said you didn't. And it was payable to whom?

A Capitol Airways.

Q And you actually went on the July 1, 1965, flight. Has Capitol refunded the 92.50 per passenger to you?

A No, sir.

MR. STRAUS: I have no further direct.

MR. BERKOWITZ: I have no questions.

EXAMINER FREDRICKS: You are excused, Mr. Brecher.

MR. STRAUS: I suggest that perhaps we break for lunch.

[Tr. 314]

I am through with my witnesses at the moment.

EXAMINER FREDRICKS: Yes. Is that agreeable,
Mr. Berkowitz?

MR. BERKOWITZ: Off the record.

(Discussion off the record.)

MR. BYRNE: Mr. Examiner, we have documents which
are marked BOE Exhibits 1 through 25 into evidence.

EXAMINER FREDRICKS: I understand there is no
objection from Capitol--

MR. BERKOWITZ: No objection.

EXAMINER FREDRICKS: -- to that, and Exhibits 1
through 25, BOE 1 through 25, are received in evidence.

(BOE Exhibits 1 through 25 are received in
evidence.)

EXAMINER FREDRICKS: And at this time we will
recess until 2 p.m.

MR. BERKOWITZ: Just one moment before the recess.

EXAMINER FREDRICKS: All right.

MR. BERKOWITZ: With respect to those exhibits
which are now marked in evidence, Mr. Byrne has the
papers themselves with his penciled notations and things
and numbers.

MR. BYRNE: Yes.

MR. BERKOWITZ: But these are my only copies and
by permitting him to take these I am left without such copies.

[Tr. 315]

I may have some.

MR. BYRNE: I believe you have copies of all of these.

MR. BERKOWITZ: Some, but I would like to have these available as exhibits so I can use these as copies which I may or may not have.

MR. BYRNE: Because we will withdraw them at the end of the hearing.

MR. BERKOWITZ: Do you intend to reproduce them?

MR. BYRNE: Yes.

MR. BERKOWITZ: All right.

EXAMINER FREDRICKS: They will be available to you during the hearing.

MR. BERKOWITZ: Yes, because I will have to barge through a mountain of papers here so I would like to use those if you have no objection.

MR. BYRNE: No.

EXAMINER FREDRICKS: All right. That's understood, and we can recess until 2 p.m. when we will reconvene in this room.

(Whereupon, a recess for lunch was taken until 2:00 p.m.)

[Tr. 316]

AFTERNOON SESSION

EXAMINER FREDRICKS: Let us come to order.

Mr. Berkowitz, I believe you were going to cross-examine Mr. Mitchell at this time.

MR. BERKOWITZ: Yes.

Whereupon,

DANIEL ANTHONY MITCHELL, JR.,

called as a witness, and having previously been sworn, was examined and testified further as follows:

CROSS-EXAMINATION

By Mr. Berkowitz:

Q Mr. Mitchell, you testified yesterday on behalf of the Bureau of Enforcement, and appeared in court with a subpoena which had been served upon you by the Bureau?

A Yes, sir.

Q And I think you testified that you originally were employed by Capitol some time in November 1964?

A Yes, sir, on November 16.

Q And that you continued in the employ of Capitol until what date?

A December 8, 1965.

Q November 16, '64, to December 8, 1965.

Now in connection with certain checks which counsel had exhibited to you, which you stated were loans from Nelson Group Travel and/or Mr. Friedman to yourself--

[Tr. 317]

A They were from Mr. Friedman.

Q Mr. Friedman?

A Yes.

Q And they totaled how much?

A \$5,000.

Q Now did your employer, Capitol Airways, know about that loan or loans?

A No, they didn't.

Q When, so far as you know, did Capitol become informed of that transaction?

A It was some time probably in late August or early September.

Q It was after this flight on July 1, 1965, had been performed?

A Oh, yes, definitely, yes.

Q And as a result of that information having been imparted to Capitol, your services thereafter were terminated by the company?

A In December, yes.

Q Who was your direct superior?

A Irving H. Mansfield.

Q And his title was--

A Director of sales.

Q And as a result of this situation and your services, you say, were terminated, was Mr. Mansfield asked to resign?

[Tr. 318]

A Yes, he was.

Q And what was the date of his resignation from the company?

A The same date as mine, December 8th.

Q And you say he is your direct superior?

A Yes.

Q And you were directly responsible to him?

A Yes.

Q And he in turn was responsible for your activities?

A Yes, sir.

Q Now did you at any time from the date of your employment by Capitol, November 16, 1964, until the conclusion of the relationships of various flights with Nelson Group Travel, did you in any way confer upon Nelson Group Travel Corp. or Mr. Michael Friedman any particular benefit which was improper?

A None whatsoever, sir.

Q Did you hear him testify that he had arranged this transaction with you so that he would have some special privileges, words to that effect?

A I heard him test that-- testify to that fact, yes.

Q Did he obtain any special privileges?

A None, sir. The only thing that he was given were some sales leads on organizations going to Jamaica, which we turn over to an agent in order to keep a steady flow of

[Tr. 319]

flights.

Q So that this would be normal procedure?

A This is normal operating procedure with any airline.

Q So that if in fact he would be successful in pursuing these leads, this might result in some business which might perhaps land in Captiol's operations?

A Exactly.

Q Or become part of Capitol's operations?

A Exactly.

Q Have the benefit of that type of operations?

A Exactly.

Q Now the fact that you have these private business dealing with Friedman, did you withhold this information from your superior, Mr. Mansfield?

A No.

Q Did you withhold it from the company?

A No.

Q Well, didn't you at one time state something to the effect, without looking further that this was a source of embarrassment to you and you did not inform the company of it, this private transaction with Mr. Friedman, words to that effect?

A I am sorry, Mr. Berkowitz. I don't think-- I can't relate the incident.

MR. BERNE: May I interrupt for a second for

[Tr. 320]

clarification?

Is the private deal we are talking about the checks that you received from Friedman?

Is that what we are talking about?

MR. BERKOWITZ: Yes. Yes.

Q Suppose I read to you, Mr. Mitchell, and see whether this refreshes your recollection--

A Yes.

Q -- a statement signed by you which stated, after referring to these loan transactions with Mr. Friedman--

A Yes.

Q "Although I wanted to make it known to one of the directors of our company, I failed to do this mainly due to lack of courage and, I suppose, primarily because of fear of losing my position. It was not until after the infamous departure of the New York State Teachers' Study Group charter that I finally discussed it with Mr. Francis Roach and later to Mr. Mansfield."

Do you recall that?

MR. BYRNE: I object. I would like to know what statement he is reading from.

THE WITNESS: That's a statement that I had written to--

Q I show you this page of this statement and ask you whether or not this bears your signature, and I now refer

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you to this language which I just read. Is this correct?

A Yes.

MR. BYRNE: Mr.Examiner, is this going to be in evidence?

MR. BERKOWITZ: It's dictated into the record, and he agrees that he made it.

Q Mr. Mitchell, this statement which I exhibited to you and which bears your signature consisted of six pages, each page signed by you, and isn't it true that this statement came about as a result of the discussion which you had with Mr. Roach?

A Yes.

Q And you learned that the company was investigating this situation and weren't you told that the company wanted to know everything about it?

A Yes.

And was he investigating all of the facts?

A Yes.

Q And wanted to get your version of it so that you would have every opportunity to explain it?

A Yes.

Is that correct?

A That is correct.

MR. BYRNE: Mr.Examiner, I think the statement should be put into evidence.

[Tr. 322]

MR. BERKOWITZ: I read it into the record. It is just one paragraph. I can reproduce that paragraph, if you wish.

MR. BYRNE: I think we would like to see the whole statement because it may bear on the question of relevance.

EXAMINER FREDRICKS: I think you are entitled to see the whole statement.

MR. BERKOWITZ: I will exhibit the statement to counsel, but I think it bears upon many other things which have no relevance to this proceeding.

EXAMINER FREDRICKS: Yes. I think quite possibly the enforcement attorney won't want all of it in, but he will be the judge of whether he will propose that.

MR. BYRNE: Could we go off the record a moment to look at that?

EXAMINER FREDRICKS: Well, we will go off the record while he looks at that.

THE WITNESS: May I say something? That's a personal statement.

MR. BERKOWITZ: Yes, there are a number of statements dealing with his matrimonial situation. I might also say that this is a confidential statement issued by him to me as an attorney for Capitol Airways, and I think it is a confidential statement, and it was not prepared for the

[Tr. 323]

purpose of this litigation or these proceedings, but a purely confidential matter involving a relationship of this man, this witness, as an employee with Capitol, my client, as employer.

EXAMINER FREDRICKS: Are you willing, Mr. Mitchell, that the enforcement attorneys read the statement?

MR. BERKOWITZ: That is, not into the record, but off the record.

EXAMINER FREDRICKS: For their own determination to see whether they want to request any more than the paragraph which Mr. Berkowitz read to appear?

THE WITNESS: Yes. I am wholly in favor of it. It might possibly clear up the reason why the money was borrowed from Mr. Friedman to begin with.

EXAMINER FREDRICKS: Let's be off the record.

MR. BYRNE: I would like to recess for approximately five or ten minutes so we can read the statement.

EXAMINER FREDRICKS: Let us take a 10-minute recess.

(Recess.)

EXAMINER FREDRICKS: Mr. Byrne, I see you are all ready.

MR. BYRNE: Yes.

EXAMINER FREDRICKS: We will go back on the record now. We will come to order.

[Tr. 324]

By Mr. Berkowitz:

Q Mr. Mitchell--

MR. BYRNE: May I ask the question now: Are you going to ask further questions on this?

MR. BERKOWITZ: On this statement? No. I am just going to clarify the date.

Q (Continuing) Mr. Mitchell, this statement which I have referred to of six pages was delivered by you to me?

A Yes, it was.

Q It has no date on it, but it has my notation "delivered on October 26." Would that be approximately correct?

A Yes.

Now when you started your employment with Capitol Airways on November 16, 1964, at that time this charter agreement, BOE Exhibit 1, for the July 1, 1965, flight of the New York State Teachers' Study Group had already been prepared and the name of I.-- E. Mansfield--

A I. H.

Q (Continuing) I. H. Mansfield-- my copy is hard to read-- had already been typed in, had it not?

A Yes, that's correct.

Q So that some time thereafter you signed it on behalf of the carrier in place of Mr. Mansfield? Do you recall

that?

A Yes, I do.

Q And do you recall about when it was that you signed this agreement, this charter contract, BOE 1, which is dated--

A 6.

Q -- 6, 1964?

A It was late in December.

Q Late December?

A Yes, sir.

Q And likewise the charter agency agreement, Exhibit BOE 2, has the name of Mansfield typed in, and above that your signature.

Was that document also signed late in December with the other?

A Yes, at the same time with--

Q Yes.

A -- with the contract.

Q And at that time did you receive a down payment?

A Yes, sir.

Q So until you signed on behalf of the carrier there had been no commitment on behalf of the carrier?

A No, there wasn't.

Q And that was awaiting the down payment and your re-verification of the availability of equipment, of aircraft

[Tr. 326]

for July 1?

A That's right.

Q Now didn't you know that in the latter part of December, 1964, the New York State Teachers' Study Group had previously been formed?

A Yes, it did.

Q That organization had already been in effect?

A Yes.

Q And did you also know that there had been solicited by that group the various individuals who would comprise the members of this charter-party?

A Yes, it was my understanding that they had operated a flight the year before and it was so successful that they had already formed a group for the year of 1965.

Q Right.

A And they deposits in it, et cetera.

Q So that when this agreement, agreements, BOE 1 and 2, were signed at that time, there was no necessity at that time for Nelson Travel Service to go out and solicit people?

A No.

Q It had already been done?

A Yes.

Q The group was ready?

A Yes.

Q Now did you have any authority or discretion

[Tr. 327]

concerning dates when certain equipment or aircraft would be available on behalf of Capitol Airways or of Capitol Airways?

A None whatsoever.

Q Pardon?

A None whatsoever.

Q And who in the operation of the business of Capitol Airways had to do with the availability of equipment, arranging for flights to various places?

A A specific individual or department?

Q Was it a department?

A It was a department, the op- --

Q Which department was it?

A The operations department.

Q And at that time Capitol was operating about 40 aircraft, roughly?

A Roughly, yes.

Q And it had performed some maintenance in Nashville as well as--

A Wilmington, Delaware.

Q Capitol employed-- you don't know many they employed?

A I have an idea.

Q What is your idea?

A Somewhere over 500, 600 employees.

[Tr. 328]

Q Was it closer to 750 people?

A Perhaps.

Q So that in such an organization different duties were delegated to different people and to different departments?

A That's correct.

Q You understand when you were employed what your duties were?

A Yes, I did.

Q And they were--

A To procure business on a sales level for Capitol Airways.

Q Whatever business you would procure would be subject to acceptance by the proper department?

A Exactly.

Q And you were aware, were you not, that Capitol as a supplemental carrier had tariffs on file with the Civil Aeronautics Board?

A Yes.

Q And that charges made by Capitol would have to be in accordance with those tariffs?

A That's right. Yes, sir.

Q You had been in the airlines business before?

A Yes, sir.

Q What is your background, Mr. Mitchell?

[Tr. 329]

A I had come to Capitol Airways from Alitalia. I worked with them for four years as district sales manager.

Prior to that I worked for aircraft for three and half years as a sales representative in the State of New Jersey.

Prior to that I had worked with Slick Airways and Riddle Air, Riddle Airways.

Q So that, all in all, how many years have you had in the airline field?

A 15. 15 years.

Q 15 years?

A Yes, sir.

Q So that there is no question in your mind therefore that in connection with a flight of this type, a charter, that the payment or collection of a tariff was important?

A That's correct.

Q What did you do when payment was not received by Capitol Airways of the entire charter price of \$52,331 prior to July 1, 1965-- and I am now talking about the month of June--

A Yes.

Q -- had you been in touch with the home office?

A Yes. On many occasions.

Q Had you prior to June 29, or June 28, been able to obtain a manifest?

[Tr. 330]

A None, sir.

Q What efforts did you make to obtain such a manifest?

A I was primarily concerned in collecting the money and the manifest at the same time, and upon many many phone calls with Mr. Friedman and meeting him in various places in New York City, I was unsuccessful in collecting any money.

He had given me a check which I-- a personal check which I had tried to clear through the bank and, since there were no funds there, there was no point in depositing the check.

Finally I would say about somewhere after June 20, I found out that he had owed other people money as well, and it became very frightening to me and I was after him daily then.

MR. POLLACK: I can't hear you.

A (Continuing) He was after-- I was after him daily and I was trying to collect the money and the manifest for the passengers.

Finally the weekend prior to the departure of the flight, he couldn't be located at all. He was-- I tried him home at his office.

I knew he had a-- a little apartment in Manhattan. He wasn't there, and he just couldn't be found. So finally on

[Tr. 331]

Monday I asked Mr. Schofield, my sales-- salesman, to go to the office of Nelson and attempt to find him and wait there for him, if necessary, all day in the event that he did come into the office.

When he was there he found a manifest which he was able to leave the office with. As a matter of fact, he found two manifests and we had sent out telegrams to the people that were concerned with our flight.

Q So, Mr. Mitchell, that was the way you were able to get the names and addresses in order to send these telegrams?

A Yes. There was no other way. Otherwise we--

Q And the fact is you were unable to obtain the list containing the names and addresses of the individuals comprising the charter party; is that the reason you couldn't give them previous notice?

A Yes.

Q You say this was the time when you took the bull by the horns and went over and took it and that's how you were able to do it?

A That's correct.

Q That was the first opportunity you had to obtain the names and addresses?

A That's right.

Q Now, did you contact Mr. Roach in Nashville, the

[Tr. 332]

vice-president of Capitol Airways, to give him a report of what was happening in the situation?

A I did, I did this through Mr. Mansfield.

Q About when was that?

A Well, it was at least two weeks prior to the flight-- or no, less than that. About nine, about nine days, maybe eight days prior to the flight.

Q Did you eventually receive instructions from Mr. Roach or somebody else to immediately get in touch with Capitol's counsel in New York, namely myself?

A Yes, sir.

Q About when was that?

A It was probably a day before the meeting of the people at the hotel.

Q Well, would it refresh your recollection if I told you that you called me on the same day of the meeting and said you were unable to reach me on the day before?

A Yes, that is right.

Q And that was on June 29, 1965?

A Yes, sir.

Q And did I then arrange to meet with you on that evening prior to the meeting time?

A That's correct.

Q And you sat with me at the Shelton Hotel and filled me in on the facts, what had developed in this case?

[Tr. 333]

A Yes, I did.

Q Prior to that time you had not discussed this matter with me?

A Yes.

Q In substance, as a result of this conversation with you, I learned that the charter of 52,331 was short by about \$16,000?

A Yes, sir.

Q And the question was what to do?

A Yes, sir.

Q Did I discuss with you the importance, in view of the tariffs, to have the full payment made before the flight could depart?

A Yes, sir.

Q And did I also discuss with you the importance of avoiding any violation on the part of Capitol?

A Yes, sir.

Q In accordance with this meeting, did I then in our discussion arrange to address these passengers we notified?

A Yes, you did.

Q Now at some time after I was addressing the individuals who had appeared at the Shelton Hotel, did you thereafter come into the meeting room?

A Yes, there, after we had our discussion I went to

[Tr. 334]

my room and washed and changed clothing, and then I came down and--

Q You were physically in bad shape at that time?

A Yes.

Q Under a lot of strain?

A Yes.

Q So that you don't know what I said, therefore--

A I don't.

Q -- until you got into the meeting room.

When I say meeting room, it was a large room which you had hired from the hotel for purposes of this meeting?

A Yes, it was a room designed to contain about 180 people and there were something like 450 people there.

Q And the people were crowded into the room, in the corridors, in the hallways near the elevators, all over the place?

A Exactly.

Q And you saw Mr. Stephen Mindell and his associate, Mr. Rothberg?

A Yes, sir.

Q At the meeting?

A Yes, sir.

Q Now at the time you arrived at the meeting I had already stopped talking to the people?

A Yes, sir.

[Tr. 335]

Q At the time you came in did you see people holding their hands up with checks?

A Yes, sir.

Q Did you hear people make the request they be permitted to pay so that the flight would go on?

A Yes, sir.

Q Were there many such requests, many people?

A Many, many.

Q At the time you came in did you see me at all?

A I couldn't find you.

Q I was drowned in a lot of people?

A Yes, sir.

Q The place was jammed, you had to fight your way in?

A Very much so.

Q Pardon?

A Very much so.

Q Now, Mr. Mitchell, I show you this paper which purports to be a copy of a letter on stationery of Capitol Airways, Inc., November 9, 1964, addressed to Mr Michael Friedman, and ask you whether this was in the files of Capitol Airways and whether you learned after you commenced your employment.

A Yes, sir.

Q Is that correct?

[Tr. 336]

A Yes, sir.

Q That's the usual type of letter which would go out?

A Accompanied--

Q Pardon?

A Yes, that would go along with the contract and the--

MR. POLLACK: Can't hear him.

MR. BERKOWITZ: That would go along with the contract.

A (Continuing) The contract and agency agreement.

Q And at this time this form of letter, November 9, 1964, the form of contract was unsigned by Capitol but forwarded to the agent?

A That's correct.

MR. BERKOWITZ: Mr. Byrne, I don't know whether this is among the papers that you had marked in evidence, November 9, 1964.

MR. BYRNE: No, I don't believe it's been marked as an exhibit.

MR. BERKOWITZ: Now may I have this marked?

EXAMINER FREDRICKS: This will be marked Exhibit CAP-1.

MR. BERKOWITZ: Yes, might I substitute a carbon for what appears to be a photostat? Maybe this is, too. It's hard to tell.

[Tr. 337]

Is that marked in evidence, Mr. Examiner, rather than for identification?

EXAMINER FREDRICKS: Has Mr. Byrne seen it?

MR. BERKOWITZ: Yes.

MR. BYRNE: Well, I would just like to read it.

MR. BERKOWITZ: Take a look at it.

EXAMINER FREDRICKS: Is receiving it agreeable?

MR. BYRNE: Yes.

EXAMINER FREDRICKS: CAP-1 is received in evidence.

(CAP Exhibit No. 1 was received in evidence.)

Q Now I show you this paper. It appears to be a copy or a photostat of a letter of Capitol Airways, Inc., dated January 4, 1965, addressed to Mr. Michael Friedman, and ask you whether you recall that?

MR. BYRNE: Is that a copy of BOE Exhibit 3?

MR. BERKOWITZ: November 9 it is dated.

MR. BYRNE: The copy you just handed him, yes, November 9.

MR. BERKOWITZ: This is BOE Exhibit 5.

Q Do you recall that?

A Yes, sir.

Q Mr. Mitchell, now the last paragraphs reads It is our understanding that we will a check in the same amount directly from the charterer within a few days."

Do you recall that?

[Tr. 338]

A Well, I see it in writing, yes.

Q Yes.

Do you recall whether there had been a previous conversation in which the promise was made that this check of \$5,233.10 which you returned would be replaced with a check of the charterer?

A Yes. This had come from my secretary. She had spoken with someone within their office and it was agreeable to me.

Q I show you this paper which purports to be a copy of a letter of Capitol Airways, Inc., to Friedman, dated June 10, 1965.

MR. BYRNE: Is this Exhibit 14?

MR. BERKOWITZ: Yes, BOE Exhibit 14.

Q (Continuing) And I ask you if you recall this letter.

A Yes, sir.

Q And you referred in that letter, did you not, to BOE 14 to a balance still due on the charter of 16,864?

A I believe it's \$16,864.80.

Q \$16,864.80?

A Yes.

Q Will you also please read into the record the PS, the postscript on that letter?

A "Please be sure to return the completed CAB forms for

[Tr. 339]

this charter as soon as you can."

Q And what forms were you referring to?

A To part 295 of the CAB.

Q And did you get back those forms?

A No, sir.

Q Did you make further requests for those forms?

A Yes, sir.

Q What request did you make? How often and in what way did you make the request?

A This was practically a daily request that I insisted upon the balance of payments, the completed forms, the passenger manifest list.

Q And did you thereafter learn that Mr. Friedman was having various troubles at that time and that then explained to you why you were having this difficulty?

A Yes, sir. Troubles I wasn't aware of before.

Q Now did you ever get the forms?

A No, sir.

Q Did you make every possible effort to get the forms?

A Yes, sir, I did.

Q Now in view of your lack of the passenger manifest or a list of names and addresses did you have any way of notifying the individual members of this charter group prior to the time you sent that telegram?

[Tr. 340]

A None whatsoever. I had no way of knowing who, who were participating in the flight.

Q And so far as you were concerned, you were dependent upon and you were guided by the advice of Capitol's attorney in New York in connection with the determination of what should be done in this situation?

A That's correct.

Q Is that correct?

A That's correct.

MR. BERKOWITZ: I have no further questions.

MR. BYRNE: I would like to have some redirect?
May I please go off the record for a few moments?

EXAMINER FREDRICKS: Off the record.

(Pause.)

EXAMINER FREDRICKS: We will be on the record.

REDIRECT EXAMINATION

By Mr. Byrne:

Q Mr. Mitchell, you said that you informed Mr. Mansfield prior to the flight of July 1, 1965, that you had accepted certain payments from Mr. Friedman. Am I correct in that statement?

A Payments, that's applied to the operation of the charter.

Q No, personal payments. I am referring to the \$5,000 in payments.

[Tr. 341]

A No.

Q You did not state that, that you had informed Mr. Mansfield that you had received this money from Mr. Friedman?

A Did I state that?

Q Yes.

A It's possible.

MR. BERKOWITZ: May I have the question?

Q I was under the impression that you told Mr. Berkowitz that you informed Mansfield that you had accepted certain payments, personal payments?

MR. BERKOWITZ: Well, I think that the--

A This was not until after the investigation started on the charter flight that I advised Mansfield and Mr. Roach, and I assumed this would come out in the wash anyway, so I had to tell them about it.

Q I see. You are stating that--

MR. BERKOWITZ: Pardon me for interrupting, but I didn't finish what I started to say. I think perhaps in the confusion you referred to these as payments. He referred to them as loans.

MR. BYRNE: Well, I realize that, but we will just state payments.

MR. BERKOWITZ: There may be a different connotation in that type of phraseology.

[Tr. 342]

Q So you are stating that you did not tell any officer or any person in Capitol's home office about these personal payments from--

A I would prefer to change that to personal loans, if you don't mind. That's exactly what they were.

Q Well, you know what we are talking about.

A They were not payments. They were loans.

Q Well, "payments" is a general term, if I may state. It can be a loan or anything else.

EXAMINER FREDRICKS: Yes. I don't think Mr. Byrne had any connotation of any kind in mind except a delivery of money.

MR. BERKOWITZ: I am fully convinced Mr. Byrne did not intend the inference--

EXAMINER FREDRICKS: Three checks for five hundred, one for three thousand.

Did you officially inform any Capitol employee or any of your Capitol superiors about any of these payments prior to July 1, 1965?

A No, sir.

Q They were not aware of any of these payments until after that charter was operating?

A That's right.

Now you stated in cross-examination that you gave Friedman certain sales leads?

[Tr. 343]

A Yes, sir.

Q Would you please explain exactly what these sales leads were?

A Well, when we had received inquiries from organizations we were not physically set up to go out and develop a market for them or an area for which they could visit, so we would suggest certain areas to suit the flexibility of our own operations and, since we were trying to operate a weekly flight or a back-to-back flight into the Jamaica area, Kingston and Montego Bay, we would then in turn suggest that they contact Mr. Friedman in this case that was doing Jamaica or we would give it to another agent who was handling another area, and then the agent would then get in touch with them, or the inquiring organization would then get in touch with the agent.

Q Now as to the signing of the charter agreement, you stated that you signed the charter agreement in late December 1965?

A Yes. If you recall, you showed me a letter yesterday where I had--

Q Or late December of '64. Excuse me.

A '64. If you will recall, you showed me a letter where I had sent the contract and the agreement back to Mr. Friedman and that was dated December 29, if I recall.

Q Well, was the usual practice that someone from the

[Tr. 344]

chartering organization would sign the contract first?

A Yes, it would be necessary to do that.

Q Yes.

A Yes.

Q And then you would send the contract to the home office to be approved?

A Just a moment. I would send it out to the agent who then would take the contract out to that chartering organization.

They would sign it, and they would probably pay the agent the 10 per cent deposit or whatever was required.

The agent would then bring it to me and I would phone my home office to find out if the dates were still available.

If they were still available I would countersign the contract and then go ahead and sign an agency agreement.

Q I understand.

Now, you stated that when payment had not been received on the July 1st, 1965 charter, you contacted your home office to inform them of this matter?

A Yes, sir.

Q When was the first time you contacted the home office that payments were not forthcoming on time?

A Well, every piece of correspondence that you have there. You had shown me several letters which mentioned that

[Tr. 345]

there were balances due.

Q Yes.

A A copy goes to our office in Nashville.

Q Was this the nature of the information that you gave the home office?

A No.

Q Or did you--

A That was part of it, but there were daily conversations with them.

Q On the telephone?

A Yes.

Q When did you first make telephone conversations on this problem of collecting payment on the July 1, 1965, charter?

A Well, it wasn't until it became evident that he was in trouble.

Q Approximately when would this be?

Would this be a few weeks before? A month?

A Just a few weeks before.

Q This would be in the early part of June?

A Yes.

Q With whom did you speak in Capitol about this?

A Mr. Mansfield.

Q What was his position?

A Director of sales.

[Tr. 346]

Q And what were his duties as director of sales?
Did he supervise the charter contracts?

A Somewhat. He was more responsible for directing sales of the whole organization including the other offices within the United States and within Europe.

Q Did you speak to any other person with respect to the problem of collecting payment on this flight?

A I might have spoken to Miss Rooney about it. Miss Rooney was assistant to Mr. Mansfield.

Q Did you talk to Mr. Roach or any other employee?

MR. BERKOWITZ: Employee?

Q (Continuing) Or officer of the company?

A Not at that time. Perhaps maybe a few days prior to the operation of the flight when it became rather hectic.

Q Now you stated that you asked for the manifest, passenger manifest, from Nelson Travel Service continually?

A Yes. Yes, I did, sir.

Q Did you inform Mr. Mansfield that you were having difficulty getting this passenger manifest?

A Mr. Byrne, may I say this: I was trying to collect the moneys from Mr. Friedman. Now it only goes without saying that if I was trying to collect the money, I was trying to collect the CAB forms and the manifest as well, because they all come in as part of one package.

It's rather obvious that this would be the procedure.

[Tr. 347]

Q Well, what was your usual practice in collecting the CAB forms? Would these forms come with the last payment?

A No, they normally came in anywhere up to 30 days in advance on the flight.

Up to 30 days in advance?

A Yes.

Q So when you did not receive these forms, say, by June 1st, you began to press and--

A Yes, not only for the forms but for the money as well.

Q -- Mr. Friedman for the forms and for the money?

A Yes.

Q Did you state what you told Mr. Mansfield on the telephone on a number of occasions in June that you had difficulty in obtaining payments from Nelson Travel Service on this charter? Is that correct?

A Yes.

Q Now with respect to the meeting that occurred on June 29, 1965--

A Yes, sir.

Q -- the meeting that you called for the passengers on this flight, at what time did this meeting occur?

A In the evening. I don't know the exact time. Perhaps eight, 8:30, nine o'clock.

Q Now who called the meeting to order?

[Tr. 348]

A Mr. Berkowitz.

MR. BYRNE: I see.

EXAMINER FREDRICKS: I see.

(Discussion off the record.)

Q And you came later on after Mr. Berkowitz had finished speaking?

A Yes, I did.

Q Would you give a summary of what you stated to the passengers when you spoke?

A Yes. It was merely a follow-up on our concern of operating the flight because of the rules that we were governed under by the CAB, and of course they didn't care about the rules on the CAB. They merely wanted to go to Europe and--

Q Well, first of all, you stated that full payment had not been made.

A Yes.

Q By Nelson Travel Service.

A I told him.

Q On this flight?

A That's what we had collected, yes.

Q And you stated that it was not possible for Capitol Airways to operate this flight unless they received the additional money?

A No, I didn't-- if I said that I didn't mean to infer

[Tr. 349]

that.

I state that we were uncertain as to the legality of the flight without having the moneys.

Q But you stated that you had taken the position that you would not operate the flight with only part payment having been received by Capitol, is that correct?

You made it clear to the passengers that this flight could not get off the ground with only partial payment having been received by Capitol, is that correct?

A Perhaps this is the feeling they had derived from it or-- this is their interpretation of it, but this wasn't so.

Well, isn't that the obvious conclusion that would arise?

If you tell persons that you have only received a partial payment and that more payment has to be made, it does sound like the flight can't go off without the other?

A It does sound like the obvious conclusion, yes.

Q Now you stated that a number of passengers began to add, requested that they could give payment so that the flight could get off the ground?

A Yes. You see, there were some-- actually we had only sent out telegrams that would bring at a maximum 180 people, and in most cases it would have been less, because

[Tr. 350]

180 people, if they were husband and wife teams, there would have been 90 individuals. But going along with either a wife or a husband or a child, there were a good 400 to 450 people there.

When I came down and got off at the mezzanine floor there were people out in the corridor and I had to fight my way through in order to get into the room.

When I finally got into the room I would say the room was no larger than this room and I had to fight my way through the crowd.

Everyone was shouting, talking at the same time. The only way I could be heard was to get on top of a desk and I stood there three to five minutes before we could get any kind of silence so that I could speak.

And no one seemed to care what I was going to say. They merely wanted to go on board the flight.

They told me they had rented their homes for the summer, they made arrangements in Europe for different tours and chartered--

Q Well, this occurred after Mr. Berkowitz spoke. You arrived after Mr. Berkowitz had spoken?

A Yes. I think the biggest problem there was the people who were not on the manifest that we had.

See, while they were all members of the same organization, they did not know what flight they were on.

[Tr. 351]

We were only concerned with the flight we had contracted for.

Q Well, were there people from all the flights in the room as you came in?

A Yes. Well, this, as I explained before, there would have been a maximum of 180, but as it turned out there were four to 450 people.

Q So you spoke to the entire group, is that correct?

A Yes. They were all members of the New York State Teachers' Study Group but it just so happened that they were not all on our one flight which can take a maximum of 183 people.

MR. BYRNE: I have no further questions.

RECROSS-EXAMINATION

By Mr. Berkowitz:

Q Mr. Mitchell,--

A Yes, sir.

Q -- were many requests made that the people who were not concerned with the July 1st flight leave?

A Yes, that the people who were not put on board our flight--

That those people who were there who were not invited, who were not on the July 1st manifest, that they leave.

A Yes.

Q Many times?

A Yes.

[Tr. 352]

Q And in so far as the possible cancellation of flight, that had to do with my statement before you came into the room?

A Yes, sir.

Q Is that correct?

A Yes.

Q You didn't hear my statement?

A No, sir.

Q But you do recall in my earlier meeting with you I took that position, did I not?

A Yes, sir.

Q That it was my legal opinion that the flight should not depart unless full payment was received, to cancel the flight?

A Yes, sir.

Q This agency agreement, BOE 2, which you say you sent out with the charter agreement, BOE 1, was that the standard printed form of agreement used by Capitol?

A Yes, sir.

Q And was it the practice to use that same form in every instance where a charter agreement was entered into?

A Yes, sir.

MR. BERKOWITZ: That's all.

REDIRECT EXAMINATION

By Mr. Byrne:

[Tr. 353]

Q One further question.

Mr. Berkowitz told you prior to the meeting when you spoke with him that it would not be legal to operate the flight unless an additional amount was collected, is that correct?

A No, sir, he wasn't entirely sure of whether it was legal to operate the flight without collecting from- he had to take one stand one way or the other.

He wasn't sure, and the only way to do it was to advise the passengers who were involved in the flight that this was the case.

Q Well, a position was taken at the meetings as to whether the flight would be operated or not without the extra payment.

Didn't Capitol take a definite position at the meeting?

A No. No, he just had to go along on that basis and he said 'I don't know which way to turn.

And he didn't know whether or not he should recommend cancelling the flight or operate the flight because he didn't know what position the CAB would take about it.

Q So you are saying that no definite conclusion had been reached as to the operation of the flight or as to the legality of the operation of the flight without receiving the extra payment?

A Conclusion?

[Tr. 354]

Q Let me rephrase that. Did Mr. Berkowitz come and tell you it would not be legal to operate the flight unless an additional \$16,000 was paid?

A We were both under the impression that the flight would be not legally operated unless we paid in full.

MR. BYRNE: Fine. I have no further questions.

RECROSS-EXAMINATION

By Mr. Berkowitz:

Q And didn't I also tell you that in view of this doubt and question it would be better to cancel the flight?

A Yes, that's correct.

Q And the reason I sent the telegram and called the meeting was at least you felt you should discuss with these people and know what to do?

A Yes, sir.

Q No definite decision had been made before that?

A No. That was the purpose of meeting with the people.

MR. BERKOWITZ: That's all.

MR. BYRNE: No further questions.

EXAMINER FREDRICKS: You are excused, Mr. Mitchell.

THE WITNESS: Thank you, Mr. Examiner.

MR. BERKOWITZ: Mr. Roach, please.

Whereupon,

FRANCIS J. ROACH,

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was called as a witness, and having been first duly sworn,
was examined and testified as follows:

EXAMINER FREDRICKS: Off the record.

(Discussion off the record.)

MR. BERKOWITZ: I would like to say on the record
I understand, therefore, from this colloquy that the Bureau
of Enforcement rests except for the possibility of offering
some documentary proof which would be of a very brief
duration, such an offer.

MR. BYRNE: And unless there is something that
we need to rebut in the direct case of Mr. Berkowitz.

EXAMINER FREDRICKS: Mr. Berkowitz, yes.

MR. BERKOWITZ: Yes. But in other respects you
rest?

MR. BYRNE: Yes.

MR. BERKOWITZ: Mr. Examiner, at this time may I
reserve my motions until the conclusion of the entire case?

EXAMINER FREDRICKS: Yes.

MR. BERKOWITZ: So I might proceed then with my
case?

EXAMINER FREDRICKS: Yes.

DIRECT EXAMINATION

By Mr. Berkowitz:

Q What is your full name and address, please?

A Francis J. Roach, 2325 Crestmore Road, Nashville,

[Tr. 356]

Tennessee.

Q What is your relationship with Capitol Airways, Inc., the respondent?

A I am vice-president of finance and a member of the board of directors.

Q How long have you been a member of the board of directors and vice-president of finance?

A Two different dates. I have been employed by the company since 1958, but I have been vice-president of finance since 1963, a member of the board of directors since 19-- early 1966.

Q And do you know the last witness, Mr. Mitchell?

A Yes.

Q Do you know Mr. Mansfield, who had been identified as director of sales?

A Yes.

Q And those individuals are no longer in the employ of the company?

A That's correct.

Q And does the termination of their employment related to the situation that involved this incidence with Nelson Group Travel and Friedman?

A Yes.

Q Now Capitol Airways is a large supplemental air carrier?

[Tr. 357]

A That is correct.

Q And how long has Capitol Airways been operating?

A Since January of 1946.

Q And in July 1965 approximately how many airplanes did Capitol operate?

A Approximately 40. It could have been 39, 40 or 41.

Q And does it also operate jet equipment?

A Yes.

Q DC 8F's?

A DC 8F, yes.

Q And does Capitol have sales offices throughout the world?

A Yes. We have sales offices in London and Paris, Frankfurt, Berlin, Rome, Los Angeles, New York, Nashville.

Q And does it maintain its own aircraft at the maintenance bases?

A We maintain our own aircraft and our own maintenance base at Wilmington, Delaware.

Q And do you maintain in Nashville?

A Some, very little.

Q Is there some emergency maintenance and some other places throughout the world?

A Yes.

Q Now was Capitol Airways granted trans-Atlantic

[Tr. 358]

operating authority by the CAB?

A Yes.

Q And about when was that?

A I believe the President signed it in March of 1964.

Q In 1965 could you tell us, please, approximately how many passengers were transported on trans-Atlantic charters?

A Approximately 55,000 passengers.

Q And Capitol still holds that type of authority, trans-Atlantic charter authority?

A Yes, we do.

Q And have the operations of Capitol increased since 1965?

A Yes, they have.

Q Capitol has acquired additional aircraft?

A We have.

Q Has Capitol also been granted further operating authority by the Civil Aeronautics Board in its last supplemental air case, supplemental carrier case?

A Yes, we received permanent domestic authority.

Q Plus recommendations for authority elsewhere?

A We have recommendations for other operating authority that's still pending before the Board.

Q Yes.

[Tr. 359]

A Mostly in the Caribbean area.

Q And in connection with this proceeding in which Capitol was granted this additional authority, you testified in that case?

A Yes, I did.

Q And Capitol submitted exhibits in that case?

A We submitted extensive exhibits.

Q And as part of the proof submitted by Capitol in that case did it also submit proof of its compliance record?

A We did.

Q And its conformance with regulations of the Board?

A We did.

Q Is that a necessary element in that case?

A It was required that we be found willing, fit and able to, and we were.

Q Now, Mr. Roach, when did you first learn of this difficulty with Nelson Group Travel and New York Teachers' Study Group?

A I learned about it in two different degrees. During the course of perhaps May and June, early June, I knew that there was a problem of collecting money from one particular customer in New York.

I discussed it with Mr. Mansfield on several occasions and on each occasion he was repeating to me the things that he had heard from Mr. Mitchell about how they

[Tr. 360]

"almost had it, they are going to get it tomorrow, everything was-- \$25,000 came in today and the balance is going to be due but nothing can be done about it. We are working on it."

They were giving excuses which they didn't believe in and passing that information on to me.

As of the latter, the middle of the month of June, I would say during the weekend of June 25,-- I received a telephone call from the General Counsel of another airline, asking me if I knew somebody in the New York State Teachers' Study Group other than Mr. or Mrs. Friedman, and at that point I had never heard of them.

I told them I would try to find out who the president of the organization was, and discovered that the president was Mrs. Friedman, and that we had in our files nothing except one name and one address.

I advised him of that and he indicated that they were going to cancel two trips that they had with the organization because they hadn't received payment, and they had had information that the man was going to jail.

On the basis of that I got extremely interested with our people to find where we stood with them. It was at that very point that it became a matter that the officers of the company understood that there was a problem.

Q What, if any, action did you take thereafter, after

[Tr. 361]

learning this from this other counsel for some other airline?

A Well, that we merely went back to our own people to find out more and more and more, and it was that kind of pressure that persuaded Mr. Mitchell to send his employee, his salesman, over to the offices of Nelson Travel to acquire everything that could be acquired, because the-- both the husband and wife were underground at that time.

Q Neither one could be contacted?

A Neither one of them.

Q Now the date of the meeting with the charter members was fixed as June 29, which was two days prior to the departure date of July 1.

When did you learn for the first time of this proposed meeting? How did you learn about it?

A I am not certain whether it was Mr. Mansfield, Mr. Mansfield initiated the idea, or whether somebody recommended it to him, but Mr. Mansfield was the one who told me that we were the ones who were initiating a meeting with these people, principally because there was obviously going to be a hardship problem with all of these people who thought they were going to be going some place on July 1 and we would be in the position of not having collected all of our money and we had to put them on notice, and we approved of the idea and thought it was the best way to

[Tr. 362]

get the information to the passengers, and really the only way we could think of.

Q What, if anything, was done about having the matter referred to counsel in New York for Capitol Airways? How did that come about?

A I personally called Mr. Mitchell.

Q About when was this?

A I would say that would be on either-- must have been on Monday, June twenty-- Friday was the 25th-- it would be the Monday after Friday, 25th.

Q About the 28th?

A And I instructed Mr. Mitchell how best he could locate you in the evening.

Q And what instruction did you give him after what to do about locating me?

A To get your legal opinion about the situation as to-- with all the facts he could give to you.

Q And act accordingly?

A And act accordingly, yes.

Q Now thereafter did you learn that the meeting was held?

A Yes, I did.

Q Did you also learn that I attended this meeting?

A Yes, I did.

Q And did you also learn that I took the position that

[Tr. 363]

the failure of Capitol to collect the balance in tariff might result in a tariff violation?

A Yes, I do.

Q And that the Board might so determine?

A Yes.

Q And did you also learn it was my view that under the circumstances, to avoid any doubt, it was best to cancel, but that the teachers had prevailed upon Mr. Mitchell to proceed with the flight?

A Yes, and that virtually all the money had been paid at the time.

When I learned there had been a meeting and the meeting had been concluded, the money had been collected when I first heard about it.

Q And did the flight depart?

A The flight departed, substantially on time.

Q Are you familiar, Mr. Roach, with the form of aircraft charter contract, that is, Exhibit BOE 1, and the conditions on the reverse side of the agreement, particularly paragraph 3?

A Yes. Yes, I am.

Q Would you be good enough to read that into the record?

A "This contract is subject to all the applicable tariff and tariff rules of the carrier on file with the

[Tr. 364]

United States Civil Aeronautics Board and is subject to such governmental approval as may be required under applicable law to permit the carrier to furnish the transportation contracted for herein."

Q Now, Mr. Roach, had Capitol Airways in the years of its operation ever had a similar problem?

A To the best of my knowledge I never heard of anything even closely resembling this.

Q And since this July 1, 1965, flight, has Capitol Airways had a similar problem?

A Absolutely not.

Q Neither before nor after?

A Neither before nor after. That's correct.

Q Now in view of what has transpired in this instance where you permitted the teachers-- when I say you, your office permitted the teachers to pay the balance of the tariff, if such a situation arose in the future, do you have any rule or guide by which your employees would be instructed?

A I really don't know, Mr. Berkowitz.

Q Do you feel it would be better to cancel the flight?

A I am absolutely certain that, if we had been the coward that the other airlines were in this whole transaction, we wouldn't be sitting here in this room.

[Tr. 365]

Q What do you mean?

A I believe that we were the ones that took a public responsibility to these people, gave them an opportunity to cure the problem, and secure the transportation.

The other carriers just said, "Goodbye."

I think you have the wrong carrier on the stand here.

Q You have been here. I think one witness testified that you were concerned about losing the business.

A That couldn't possibly be true because the United States Government was begging us for airlift. This trip could have been cancelled on Monday and another trip operated on Thursday with no problem whatsoever.

Q Now is a major portion of Capitol's business on behalf of the United States Government?

A Not quite 50 per cent of it, but last year it was 47; 47 per cent is military.

Q And is it true that the problem is the shortage of airplanes, there is more business than can be conducted?

A That's true today, it was true last July and it's true ever since the hostilities in Vietnam have been accelerated.

Q So you certainly didn't want this problem?

A That's right.

Q Now, Mr. Roach, you were present when the other

[Tr. 366]

witnesses testified on their cross-examination. You heard me ask them whether or not they recall hearing my statement that Capitol was more concerned with its compliance with the law than with the balance of \$16,000.

Is that a true statement?

A It certainly is true so far as we were concerned, yes.

MR. POLLACK: He wasn't there.

Q No, but is that your view?

A I know it's my view personally, and the view of every other responsible person in the company.

Q Now what, if anything, did you do or did Capitol do about getting the statement of supporting information which was required to be submitted and kept on file with Capitol, by Capitol?

A I believe we did exactly what Mr. Mitchell testified to. We just made repeated efforts to get the information and in an equal manner as we tried to recover the money.

Q And I show you these papers and ask you what they represent, pages 12 and 13.

A These, this is a statement of supporting information for the New York State Teachers' Study Group which is required to be completed by the carrier.

Q And has it been completed to the-

[Tr. 367]

A Yes, it has.

Q To the best of the ability of Capitol to do so?

A Yes, it has.

MR. BYRNE: What statement is this?

MR. BERKOWITZ: I will show you that. I will exhibit this to counsel.

MR. BYRNE: This is part 1 of the statement of supporting information.

MR. BERKOWITZ: Yes.

THE WITNESS: That's correct.

MR. BERKOWITZ: May I have this marked?

EXAMINER FREDRICKS: Yes. The statement to which you referred is marked Exhibit CAP 2 for identification.

(CAP Exhibit No. 2 was marked for identification.)

MR. BERKOWITZ: Can we have it marked in evidence?

MR. BYRNE: No objection.

EXAMINER FREDRICKS: No objection. Yes, the exhibit just marked is received in evidence.

(CAP Exhibit No. 2 was received in evidence.)

Q Now in connection with the efforts to obtain a portion of the supporting information required to be obtained from the agent, were you ever able to get that?

A No, we were not.

Q Well, at the time this flight departed, did you understand Mr. Friedman was under arrest?

[Tr. 368]

A Yes, we did.

Q And before that your efforts to locate him had been unavailing?

A That's true.

Q Do you know of anything that you could have done or that your company could have done other than what was done in order to obtain this supporting information from Nelson Group Travel or anybody else?

A The only thing we could have done in excess of what we did do was to pursue them after we knew there was a criminal problem on our hands, and we didn't want to pursue them for paper work under the circumstances.

Q You realized it would be futile, too, did you not?

A We realized it would be futile. We realized, even if they gave it to us under oath.

Q Now, prior to this meeting on June 29, 1965, was your attention called to some item in the newspaper published just within a few days prior to June 29, of the arrest of Mr. Friedman because of the raising of a certified check of 4,000 to 104,000?

A Yes.

Q And that was additional information received by you plus that from the attorney for some other carrier?

A I heard the information from two sources,

[Tr. 369]

substantially at the same time, within one day of another, within one day of one another.

Q Now you are generally familiar, are you not, Mr. Roach, with Section 403 of the Federal Aviation Act?

A Yes, I am.

Q Generally that prohibits a carrier from charging, demanding more or less than its tariff in the operation of a flight?

A Yes.

Q Incidentally, this is supporting information, CAP Exhibit 2, consisting of two pages, in view of the charter, that is, the trans-Atlantic charter authority held by Capitol, these are papers that are not filed with the Board?

A They are not filed with the Board, no.

Q Prior to receiving this trans-Atlantic authority, application was made for exemption to the Board?

A Yes.

Q Which Capitol, if it holds such authority, need not apply for?

A That's true.

Q So that this record, this information would be something which would be retained in the files of Capitol ordinarily?

A That's all we do with those papers, is keep them in

[Tr. 370]

our files.

Has anybody asked for these statements of supporting information?

A Mr. Byrne.

Q In connection with the processing of this case?

A That's right.

Q Did you learn all over that Mr. Byrne had called at my office prior to this hearing several months ago, and he was furnished with copies of all Capitol's material?

A I believe he was, yes.

Q And there has been full cooperation by Capitol with the Board and its officers?

A We always have, yes.

MR. BERKOWITZ: I have no further questions.

MR. BYRNE: May I please have a few moments before I cross-examine?

EXAMINER FREDRICKS: Yes. Do you want a recess?

MR. BYRNE: For five minutes, if that is agreeable.

EXAMINER FREDRICKS: Yes. We will take a five-minute recess.

(Recess.)

CROSS-EXAMINATION

By Mr. Byrne:

Q Mr. Roach, you stated that you have been vice-

[Tr. 371]

president of finance since 1963?

A Yes.

Q What are your duties in that position?

A I participate in-- well, let me put it this way. The company is owned by Mr. Jesse Stallings and he owns 87-1/2 per cent of the stock and there are two or three of the officers who are informally a management committee, you might say.

I am one of those, and I participate in all the major decisions.

The final decision in every case is Mr. Stallings.

Q I see. Do you supervise the business of Capitol generally, the major decisions, or--

A I participate in those major decisions.

Q Did you know Mr. Mansfield personally?

A Yes, I did.

Q He worked at the Nashville office?

A Yes.

Q Is that correct?

A Yes.

Q How many persons are in the national office that are working for Capitol Airways?

A Approximately a hundred, I would say.

Q A hundred persons.

Did you know Mr. Mitchell personally?

[Tr. 372]

A Yes.

Q Did you in the course of your duties visit various sales offices of Capitol Airways?

A Not for that purpose but in-- for-- I would-- I visited those cities where we had sales offices for other purposes and always took advantage of the opportunity to have a conference of some sort with the sales people.

Q You stated that you first learned of trouble about this particular charter, the July 1st, 1965, charter, for the study group in June?

A Yes.

Q Early June?

A Yes.

Q Who informed you of this problem about collecting payment?

A Mr. Mansfield.

Q Did he inform you that the New York office was having difficulty in collecting payment from Nelson Travel Service--

A Yes, he did.

Q -- for this charter? What was the reason, the precise reason, why Capitol Airways dismissed Mr. Mitchell? Was it because he had received these personal payments from Mr. Friedman?

A I would rather characterize it as extremely poor

[Tr. 373]

judgment. That's why Mr.-- he exercised extremely poor judgment in performing his duties with the company.

Q What was the reason for dismissal of Mansfield?

A Exactly the same, just poor judgment.

Q Well, did he have direct dealings with Nelson Travel Service or Nelson Group Travel Corp.?

A Possibly, but not in the continuing basis, not to my knowledge.

Q But you believe that his dealings with Nelson Travel Service were improper?

A No, I felt it was his responsibility to have made sure that it didn't happen, and he did not accomplish it.

Q That what did not happen?

A That this improper transaction took place.

Q Well, how could he possibly have prevented these personal payments? Isn't the claim made by Mr. Mitchell that these were personal loans and so forth?

A Yes.

Q Well, what did Mr. Mansfield have to do with these particular loans?

A He hired Mr. Mitchell.

Q And you believe that he was responsible for the actions or the poor judgment?

A Well, for not hiring a person more capable of doing the job "period."

[Tr. 374]

Q Of course, in the course of your duties as an officer of the company you approved the appointment of Mitchell in the New York sales office?

A No, I didn't. Of course not.

Q Well, who? Doesn't some officer of the company have to approve?

A No.

Q Well, how is a district sales officer hired? Who hires him?

A By-- Mr. Mansfield, the director of sales.

Q In other words, the duty is delegated to him?

A That's correct.

Q Did Capitol Airways issue any instructions after this July 1, 1965, charter, after the problems concerned, involved with this, concerning the collection of charter payments for travel agents?

Has there been any change in policy by Capitol Airways?

A Every op- -- or-- we have instructed our sales people at every opportunity to make sure the people know to make the checks payable to Capitol Airways, and if they don't do it, they do it at their own risk.

Q That is, the chartering organization?

A The organization or the agents or both of them.

Q This was an instruction to sales personnel after this

[Tr. 375]

July 1, 1965, charter?

A Yes.

Q Are you aware of the provisions of Part 295 of the Board's regulations?

A Yes, I am.

Q Do you know that these regulations require that a statement of supporting information be filed and a certified passenger manifest be filed with the carrier prior to the flight?

A Yes.

Q Is that correct?

A Yes.

Q What is the usual practice in your experience in allowing these statements to be filed? How late do you allow these statements to be filed?

A In some cases as late as a few days before the actual departure of the flight.

If it's a group we have never heard of before, we want it almost at the signing of the contract.

Q I see.

Isn't the purpose of the statement of supporting information that you can insure that the group is charter-worthy?

A Exactly, yes.

Q Are you aware that Capitol Airways paid a civil

[Tr. 376]

penalty of \$2500 for failing to retain or have these statements of supporting information and certified passenger manifests?

This occurred, I believe, in 1964, some time in '64 or '65.

MR. BERKOWITZ: Mr. Examiner, I certainly must object to this type of interrogation for a number of reasons.

Firstly, it is not proper cross. There is no such testimony, either direct or indirect, on the direct testimony, number one.

Number two, no such allegation has been made in the complaint. It's completely new matter.

This may require me to investigate the basis and the circumstances which were involved in that incident. I respectfully submit that it opens the door to many other problems. ... a nebulous thing that we deal

EXAMINER FREDRICKS: Don't the rules provide that other violations are proper matter in an enforcement case?

MR. BERKOWITZ: If it's alleged in the complaint.

EXAMINER FREDRICKS: Well, I don't understand, sir.

MR. BYRNE: Well, this I think is proper cross-examination because I think he testified that Capitol had a compliance attitude, particularly with respect to the statement of supporting information, and in general had a

[Tr. 377]

compliance attitude.

EXAMINER FREDRICKS: I completely agree to that as to cross-examination. I thought I read in the rule a specific provision that prior violations may be shown.

MR. BERKOWITZ: Perhaps under certain circumstances.

EXAMINER FREDRICKS: In an enforcement proceeding.

MR. BERKOWITZ: But it seems to me in the allegation of this complaint we are dealing with a different subject matter entirely and it is irrelevant to bring in a possible violation having to do with, perhaps, a pilot's qualification or something like that.

It seems to me that if it were something which would be directly related to the issues involved in the complaint it may be another matter, but it is not.

MR. BYRNE: May I read from Section 302.216 of the Federal regulations. That's Title 14, Chapter 2, Code of Federal Regulations.

It states that "Evidence of previous violations by any person of any provision of the Act or any requirement thereunder found by the Board or by a court in any other proceeding or criminal or civil action, may, if relevant and material, be admitted in any enforcement proceeding involving such person."

MR. BERKOWITZ: That's it, relevant and material.

EXAMINER FREDRICKS: Don't you think it's relevant as

[Tr. 378]

to the compliance that Mr. Roach testified to?

MR. BERKOWITZ: I respectfully disagree with your ruling. I am not in accord with that ruling.

EXAMINER FREDRICKS: I can't sustain the objection.

Q I will repeat the question. Are you aware that Capitol Airlines paid a civil penalty to the CAB for failure to keep the statements of supporting information and the certified passenger manifests?

A I am aware of an instance and obviously the one you are speaking of, where we were requested by the Board to explain several missing documents, and that developed in the course of an audit in the middle of the summer season, documents which did not necessarily have to be in Nashville at the time but were in Nashville while the investigators were there.

It was such a nebulous thing that we decided that it wasn't worth the legal expense to fool around with it, so we made an offer of \$2,000 to the Board if they would just forget about it, and the Board accepted the offer.

Q This was an offer in compromise?

A This was an offer in compromise.

Q But the fact is you paid \$2500, is that correct?

A I think it was \$2,000.

[Tr. 379]

Q Well, we'll say \$2,000 or \$2500.

A I know it was \$2,000.

Q I am not absolutely certain.

A I am.

EXAMINER FREDRICKS: I don't think the amount is material.

MR. BYRNE: That's what I say.

MR. BERKOWITZ: Well, I think it is important. The witness testified that there was no admission of the violation.

EXAMINER FREDRICKS: I heard him so testify.

MR. BYRNE: I have no further questions at this time.

MR. BERKOWITZ: I have no further questions.

EXAMINER FREDRICKS: No. Mr. Roach is excused.

MR. BYRNE: The witness which I had expected to call has not arrived yet. It is four o'clock. I wonder if we might have a recess.

MR. BERKOWITZ: Well, I thought perhaps in the interim in view of some conflict concerning what took place in this meeting, that I might take the stand briefly, which I had hoped to avoid.

So, with the Examiner's permission, I will take the stand at this time as part of Capitol's case.

EXAMINER FREDRICKS: There have been various accounts

[Tr. 380]

of what was said there and I see no reason why you shouldn't testify.

MR. BERKOWITZ: I had hoped that Mr. Seamon would be here in such a contingency if I were required to take the stand, but he isn't, unfortunately, so I will do the best I can.

EXAMINER FREDRICKS: I see no reason why you can't testify as best you can by narrative.
Whereupon,

GEORGE BERKOWITZ,
called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT STATEMENT BY THE WITNESS GEORGE BERKOWITZ:

THE WITNESS: George Berkowitz. I reside at 240 Central Park South.

I maintain an office for the practice of law at 233 Broadway, the Woolworth Building, in New York City.

I was duly admitted to the Bar in the State of New York in 1930, and I have been in active practice ever since.

I have been admitted to the courts of the State of New York, United States District Court, Southern District of New York, Eastern District, Court of Appeals, Second Circuit, and United States Supreme Court, and I have practiced in all those courts.

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For about, approximately, I would say 20 years, the past 20 years, I have practiced before the Civil Aeronautics Board, appeared in various cases on behalf of various carriers.

I have also appeared as attorney of record in enforcement proceedings and during the past several years I have represented Capitol Airways, Inc., respondent, in this New York area.

Some time in the latter part of June, 1965-- I think it was on the date of the meeting-- and I thought the meeting was June 28 but apparently-- I have been corrected-- the meeting was on June 29, 1965, at the Shelton Hotel.

I had received a telephone call from Mr. Mitchell, the New York sales office representative informing me of an existing problem in connection with a flight which had been scheduled to depart on July 1, 1965, and he requested that I meet with him so that he can discuss the situation with

ME.

I did arrange to, and met with Mr. Mitchell in the early evening of June 29, '65-- I will select that date as being the proper date-- and for the first time learned from him of this existing charter agreement and the inability on his part on behalf of Capitol Airways, Inc., to collect a balance of the charter price.

[Tr. 382]

He showed me a newspaper clipping indicating that Michael Friedman had been arrested. I believe it was in connection with some alleged charge of forging a certified check, and I learned from my discussion with Mr. Mitchell that he'd been unable to either collect the balance of the charter or to obtain the supporting information, the documents required, and it was only either that day or the day before-- I don't recall exactly, but it was shortly before our meeting that he'd been able to obtain a copy of the manifest and in that way he had sent telegrams to the individuals named on this manifest, requesting that they attend a meeting at the Shelton Hotel, which would be the evening, the same evening when Mr. Mitchell and I met.

Mr. Mitchell informed me that he had called Nashville, Nashville meaning the home office of Capitol, and Nashville instructed him to consult with me and to be guided by my advice in the matter.

Mr. Mitchell informed me that there were many other inquiries and requests for charters and that there would be no difficulty in replacing this business, but he was fearful of any scandal which might result if these secrets were not transported; he didn't know what to do.

We discussed the matter for some time and I reviewed with him my view of the applicable law and

[Tr. 383]

requirement of the carrier to collect the full charter price before operating a flight.

He asked to fill in for him. He said he had been under a terrible strain and he wanted to wash up, prepare for this meeting and he knew there would be a lot of clamor and he asked me to represent the company at this meeting until he could attend.

I did then proceed to the meeting room and found that-- this was the evening, after our meeting-- and found that there were people jammed into a room approximately this size, with a large overflow in the corridors near the elevators, wherever one would turn on the second floor, even down the stairs.

With difficulty I managed to enter this room and I managed to make my presence known; to some of the people who then assisted me, so that I was able to get up on a chair and address, as best I could, the crowd of people

And as one of the witnesses stated, it was an extremely hot night. I think it was the hottest night of the year. There was no air conditioning in operation, in close quarters with excited people and the jammed crowds made this an almost intolerable situation.

In any event, as best I could, I managed to get the attention of the people who were crowded in this room. I identified myself. I informed them that I was appearing on

[Tr. 384]

behalf of Capitol Airways and that I was the local counsel, and that there was a very serious problem involved, namely the failure on the part of the chartering organization or the agency to make payment in full to Capitol Airways of the charter price of \$52,331.

I referred to Section 403 of the Act, the requirement of Capitol to collect its full charter price in order to conduct this flight.

I informed the people as Capitol's representative that Capitol and I were more concerned with compliance with the law than with the collection of the balance of charter price, but I was fearful that the failure to collect the balance of the charter price, approximately 16 odd thousand dollars, might lead to some Board action, which might result in a proceeding against Capitol on a tariff violation.

I informed the people that we wanted to be helpful and we were concerned with Capitol's public image and we were in a quandary, that of course the easy thing to do would be to cancel the flight and for Capitol to refund the funds.

And during the course of this discussion there were many remarks made and attempts by many people to interrupt and who did interrupt. It was very difficult to maintain any semblance of order, and there were many people

[Tr. 385]

shouting, various individuals attempted to gain the attention of the crowd and people crying, lamenting that they had made their vacation plans and that Capitol should not cancel the flight.

There were many, many such pleas.

And frankly, this was a difficult situation where it was necessary to make a spot decision.

On the one hand I realized that the cancellation of the flight would cause a lot of difficulties, not only by virtue of a scandal but furthermore this would possibly result in bad notoriety.

On the other hand, I frankly was fearful that, if Capitol did proceed and operate the flight, it then might find itself charged with a tariff violation.

And I so expressed it to the people. As a matter of fact I told them from what I had heard that this Nelson Group Travel Service had made an assignment for the benefit of creditors.

I tried to explain what that meant and many of the people there kept pressing, "Let us pay the balance. We have made arrangements. We want to go, and in answer to these various entreaties and pleas I stated to them, "If that would be done that they would then be relegated to their remedies against Nelson Group Travel and Friedman and I was afraid that this might be more academic than real in

[Tr. 386]

that in the ordinary assignment proceedings generally very little, if anything, was collected by creditors, so that this may be a futile effort, but that they would then have the right to so proceed if they would assume the responsibility of proceeding against Friedman and/or Nelson by paying the remainder of the balance.

Many said, "We don't care whether we collect or not," and in any event the meeting became very unruly and, frankly, it became specifically difficult for me to continue.

As one witness stated here today, he felt sorry for me. I was afraid that the meeting was getting out of hand.

I thought possibly we could get some police protection. I asked the people about whether we could find some police because of the unruliness of the crowd.

I managed finally to get out of this room into the hall where many people pursued me pleading that they be permitted to pay the balance and Capitol proceed with the flight.

I did see Messrs. Stephen Mindell and his associate, Mr. Rothberg, and I spoke a few words with them.

They voiced no objection to the payment of the balance by the participating members of the charter flight, and I assumed they had no such objection.

Incidentally, there was a tremendous crowd there. I wouldn't dare to estimate the numbers, but it seems that many

[Tr. 387]

individuals who had not received telegrams had learned in some fashion of this meeting.

They all crowded in. Many requests were made for them to leave this meeting so that we could conduct a proper meeting, but these requests were ignored.

Now so far as I am concerned, I still believe that by permitting charter members to pay the balance of the tariff, that Capitol thus performed properly.

MR. STRAUS: I hate to interrupt right now, Mr. Examiner, but I think this is more in the form of a statement of position.

THE WITNESS: Let me suffice by stating, if I may refer to Part 295.15, subdivision e, as amended, April 11, 1965, and it is a brief subdivision:

"The carrier shall require full payment of the total charter price or the posting of a satisfactory bond for full payment prior to the commencement of the air transportation."

Now I took that to mean that, if Capitol could not collect the balance of the charter price, because I knew then by the assignment for the benefit of creditors of which I had been informed in the Nelson Group Travel and the arrest of Friedman, that there was no possibility of the agent posting a satisfactory bond.

It was also my belief that prior to this amendment

[Tr. 388]

Capitol might have given credit to a travel agent in the hope of collecting the balance of its tariff at some subsequent date, but as I informed the people at this meeting, in view of Capitol's knowledge at that time that Nelson Group Travel and Friedman were financially irresponsible, that Capitol thus was charged with notice then that it could not and would not collect the balance, and therefore this would mean operating a charter at less than its tariff rate.

That's my statement.

MR. STRAUS: I have a very few questions.

CROSS-EXAMINATION

By Mr. Straus:

Q You did say, Mr. Berkowitz, that you had to make a spot decision?

A Yes, sir.

Q And you were under great pressure?

A Yes, sir.

Q I am sure you will admit that you can make a mistake?

A Oh, yes.

Q Possibly you could have made a mistake, could you not, in this instance?

A Well, in giving it thought in the aftermath, may I say this: If I were again faced with the same situation--

[Tr. 389]

Q Well, I would really have a yes or no answer.

A What is the question?

Q Could you not have made a mistake in this instance?

A Oh, yes, the same as the Board has been reversed, I expect that I, too-- I am not infallible.

EXAMINER FREDRICKS: I think it is axiomatic, Mr. Straus, that any lawyer can make a mistake, whether in a spot decision or after prolonged consideration, and we won't confine it to lawyers, either.

Q Could you tell when you were in the hall or wherever you happened to be at the time which people were pleading with you or anyone else to continue the charter trip and offering money, did they identify themselves?

A It was obvious to me that they had paid the balance. In other words, they had paid, they claimed, the full charter price to the Teachers' Study Group, and since I was discussing only the July 1st flight, these people were interested in having Capitol carry out this flight by proffering this deficit pro-rata.

Q Oh, in other words, each person that talked to you, well, as far as you remember, the people said that they paid the full price?

A Yes.

Q Now every person in this group, from what we understand, from the testimony, paid the full price. Can you

[Tr. 390]

absolutely and positively say that every person that approached you and Mr. Mitchell and anyone else at the meeting offering payment, was a person only-- and I am not asking for what you thought they should do, but were these people only from the July 1 manifest?

Did they identify themselves as being from the July 1, manifest?

A Mr. Straus, it was a very hectic evening.

Q Well, your answer is "no"?

A My answer is it would be a virtual impossibility.

Q Well, your answer is no, you do not know whether they were from the July 1 flight?

A My answer is I would assume as much from the circumstances.

Q And when you say you saw Mr. Rothberg and Mr. Mindell in the hall or in the room, did you ask them for legal advice as to whether anything wrong was going on there?

A No, I did not.

Q Did you ask them whether they were there for the purpose of offering legal advice?

A No, I did not.

MR. STRAUS: Could we have a five-minute recess at this time, Mr. Examiner?

EXAMINER FREDRICKS: Yes, five-minute recess.

[Tr. 391]

(Recess.)

EXAMINER FREDRICKS: Back on the record.

MR. BYRNE: Mr. Examiner, at this time I would like to re-offer into evidence BOE Exhibits 1 through 96 and BOE Exhibits 98 through 111.

EXAMINER FREDRICKS: Yes.

MR. BERKOWITZ: And, Mr. Examiner, before you rule, may I at this time please have it indicated on the record that I renew such objections as I did previously to any particular exhibit, since counsel is now offering them in bulk in this form.

EXAMINER FREDRICKS: Yes.

MR. BERKOWITZ: So I don't waive any objection which I raised previously.

EXAMINER FREDRICKS: Yes. Very well.

The record will show that you raised those objections and that I overruled them to the extent already shown in the record, and do receive those exhibits in evidence.

(BOE Exhibits 28 through 54 were received in evidence.)

MR. BYRNE: Mr. Examiner, I also request permission to remove the originals from the record and have copies of the originals placed instead.

EXAMINER FREDRICKS: Yes, you have that permission.

[Tr. 392]

Permission to withdraw the original exhibits extends to Capitol also.

MR. BERKOWITZ: May I also request, please, that I be furnished with whatever copies have not been furnished as yet?

MR. BYRNE: Yes.

EXAMINER FREDRICKS: Yes, that is understood and will be reflected in the record.

MR. BERKOWITZ: Unfortunately I must say, with the use of different portions of different exhibits at different times, I don't know whether I have them all. I have them out of order, and I would appreciate it if you would furnish a copy.

MR. BYRNE: Yes. Well, we can talk about that later.

EXAMINER FREDRICKS: Now is there anything further before we discuss briefs?

MR. BERKOWITZ: I take it the Bureau rests.

MR. BYRNE: Yes, the Bureau rests.

MR. BERKOWITZ: Well, I still would like to put on the record my motions.

EXAMINER FREDRICKS: Very well, Mr. Berkowitz.

MR. BERKOWITZ: I respectfully move at this time to dismiss the complaint for a number of grounds, namely, one, I refer the Examiner to Section 385.10 of Part

[Tr. 393]

385, particularly subdivision b, and the latter part of that which provides that the Hearing Examiner has the authority in enforcement proceedings to dismiss the complaint where the finding is made by the Examiner that the proceeding has become moot and that no further basis for continuation exists.

I respectfully submit that in this situation the complaint requests that an order be entered, one, that Capitol cease and desist from violating Sections 24.90 and other sections, nine.

Subdivision 2, that Capitol be ordered to cease and desist from violating Section 403 (b) of the Act.

Fourth, the general omnibus and other pleas for grants for relief.

It appears from the record that such grants for relief from the injunction would serve no useful purpose as the ticket agent in this instance, Nelson Group Travel Corporation, is defunct.

Not only has an assignment for the benefit of creditors been made, but the corporation is out of business, the principal stockholder, Friedman, testified he had been found guilty of grand larceny and is incarcerated.

It further appears that an injunction has been obtained by the office of the Attorney General of New York which restrains various parties, namely Nelson Group Travel,

[Tr. 394]

Michael Friedman, Sari Friedman and so forth, from engaging in this type of activity, namely, the chartering of aircraft, formation of groups and so forth.

Accordingly, we now have a situation where Capitol, even if it desired to, could not conduct any further business with these people and certainly by no stretch of the imagination would we ever expect that Capitol would conduct business with these people.

Mr. Roach testified that in all the experience of Capitol, the great number of charters operating, performance of their business operations pursuant to the authority granted, this was the first time that such a situation arose and never since then has such a situation arisen.

These are unusual circumstances. I respectfully submit therefore, that the issuance of the recommendations, which is what is requested here, so that the Examiner recommends that such a cease and desist order be issued, would be a useless exercise.

What would they cease and desist on? They could not do business with these parties and certainly would not.

Furthermore, it appears that there has been a failure of proof, namely, the Bureau of Enforcement contends that moneys were paid by New York State Teachers'

[Tr. 395]

Study Group to Nelson Travel Service, and the Bureau of Enforcement has offered in evidence a series of checks of various amounts over a period of time which, by the exhibits themselves, indicate these checks were given for many different purposes, not only on account of this July 1, 1965, charter flight, but for mailing, for postage, for brochures, for other charter flights, for many, many things.

And in that connection might I suggest that in all this time since this case has been instituted, apparently the Bureau of Enforcement has made a very careful examination and investigation, spent a considerable amount of time and interviewed witnesses, went to the interview Mr. Friedman in jail, the penitentiary and had these checks which they obtained which were in evidence apparently from the District Attorney's office, had interviewed Mrs. Friedman apparently, that they have failed to submit to the Examiner any computation or analysis to indicate or establish that there had been paid by the New York State Teachers' Study Group the sum of \$52,000, the amount referred to in BOE Exhibit 1, the charter price. 52,331 is the correct figure.

And I submit that the implication is that the Bureau of Enforcement has been unable to put together and to correlate and to submit such a computation and, therefore, in order to brush over this lack, this deficiency, have

[Tr. 396]

submitted this batch of checks.

We have attempted here, with the assistance of Mr. Roach in examining these various exhibits in the limited time we had yesterday and today, to attempt to allocate which checks could possibly be applied to this charter.

We have arrived at an amount of \$20,933 consisting of four checks, 933, 5,000, 5,000, 10,000, and I therefore submit that it was essential and material on the part of the Bureau of Enforcement to establish as a material part of its case that there was in fact payment of the charter price by the New York State Teachers' Study Group to Nelson Group Travel.

In that connection may I refresh the Examiner's recollection in connection with that subject. Mrs. Friedman acknowledged that in giving these various checks to Mr. Friedman or his corporation, that she relied upon him to attend to these various matters and to act for her, and that she had confidence that he would take care of various things for the New York State Teachers' Study Group, and he in turn admitted that he misled and deceived his wife.

In view of that close relationship, obviously of New York State Teachers' Study Group with Nelson or Friedman as its agents, notwithstanding the capacity of Friedman in limited form as agent in the sense that he was required to submit certain supporting information by the Board in his

[Tr. 397]

relationship to Capitol.

In that I recollect that the testimony was that this group had been formed prior to the execution of the agency agreement, BOE 2, which was some time in the latter part of December.

So, therefore, Friedman did not as agent or Nelson did not as agent solicit or form these groups which had already been formed, that this was a printed form of contract apparently used by Capitol; apparently the phraseology did not accurately represent the true relationship and fact of the situation, and I, therefore, submit that for those two reasons there should be dismissal.

And further, there has been no contradiction of proof in the record that, proceeding as it did, relied upon the advice of its counsel, which was to the effect that, if the balance of the charter was not collected, it would be committing a tariff violation.

I refer you, respectfully, to the affirmative defenses in the answer heretofore filed and I also respectfully point out that there is no negative proof to the contrary.

Respondent has submitted clear, non-contradicted proof in support of each of the affirmative defenses. I need not elaborate, of course.

The answer is on file. It is before you.

[Tr. 398]

For those reasons I respectfully request that the complaint be dismissed.

MR. BYRNE: May I please answer that motion, Mr. Examiner?

EXAMINER FREDRICKS: Yes, surely.

MR. BYRNE: Well, first of all, it is our position that the proceeding is not moot, because the purpose of a cease and desist order is to prevent further violations of the Federal Aviation Act.

Secondly, we are not only asking for a cease and desist order in the complaint, but we are also asking for what other relief might be necessary, which could include affirmative relief.

MR. BERKOWITZ: I am sorry.

What relief?

MR. BYRNE: It could include some type of affirmative relief that could be obtained from the Board.

Secondly, as to the failure of proof, I think what Mr. Berkowitz has presented is his interpretation of the evidence and I think the facts have to be carefully analyzed, and this should be done in briefs and the questions of law applied to the facts, and this can't be done in a matter of minutes on a motion.

I think these facts and the law, applicable law, has to be carefully analyzed and applied and a decision

[Tr. 399]

reached.

MR. BERKOWITZ: Mr. Examiner, one final word, if I may. It is not one word, but just a final statement.

I can't also help but believe that the proceeding itself was improvidently commenced, for this reason: It seems to me that where you have this type of situation where you have an unusual situation, all of Capitol's experience as testified to by Mr. Roach, this has never happened before, never happened since; we don't expect that it will ever happen again.

It seems to me that an enforcement proceeding would properly lie, perhaps, in a situation where a carrier has shown a tendency in the past to violate regulations, Federal Aviation Regulations, and by its record has shown bad faith in attempts to perhaps avoid compliance, and because of such a record, such a drastic proceeding may be required for protection of the public, and also in order to restrain and prevent the carrier from future violations.

But in this instance where you have-- nobody can gainsay this-- a very unusual, special, extraordinary situation, where unquestionably, and the proof so indicates, Capitol acted on advice of counsel upon whom it relied.

It seems to me that an enforcement proceeding of the Board should not properly lie in these circumstances. There is no proof of a disposition on the part of Capitol to

[Tr. 400]

avoid compliance with regulations or the law.

I rather am surprised-- I mentioned this several times in the past, that the Board or the enforcement office did bring this proceeding in view of these circumstances of which they were aware.

EXAMINER FREDRICKS: Mr. Berkowitz, getting to your reference to Section 385.10 (b), you will note that Section 385.10 carries the heading of "delegation to the chief examiner, Bureau of Hearing Examiners."

Now I never have been and am not now and do not expect to be the chief examiner.

You will notice the following section, 385.11, delegate to hearing examiners the power to grant or deny intervention in formal proceedings, which is a very limited grant indeed.

There is also a delegation of the power to make initial decision in certain types of cases, including this.

As to the failure of proof ground, I think that your argument really goes to the basic issue of the case, which rest on the evidence that we have been taking, and that the proper procedure is to determine those issues by initial decision, with the further rights that the rules afford the parties.

So I will deny the motion to dismiss.

MR. BERKOWITZ: My exception of course is noted.

[Tr. 401]

EXAMINER FREDRICKS: Yes. Yes. That's automatic.

Now the matter of briefs has been discussed off the record, and I will set June 20, 1966, as the date of service of briefs to the Examiner, and I will impose a 50-page limit on the briefs, which will be interpreted in line with the provision in the rules which govern the length of briefs to the Board.

In other words, if there are appendices, those pages will be included in the counted 50 pages. I don't imagine this is the type of case where we would run into appendices.

MR. BERKOWITZ: No.

MR. BYRNE: I would like to make a motion, Mr. Examiner, to correct what I believe is an unintentional error in the complaint, paragraph 9.

It reads, "Although the chartering organization had by May 1, 1965, transmitted to Capitol or its agent an amount covering the full cost of the charter," I believe what that is supposed to read is, "had by July 1, 1965," a date of the operation of the charter, and that is what we so allege.

MR. BERKOWITZ: Might I ask Mr. Byrne whether or not if he checks the number of exhibits, the exhibits submitted, a number of the exhibits submitted are dated after May 1st?

[Tr. 402]

MR. BYRNE: I don't understand the question.

MR. BERKOWITZ: Well, in fact the answer, I think, to that question would indicate whether or not this was in error.

If the checks which you offered in evidence are dated prior to May 1st, then obviously this was not an error.

MR. BYRNE: Oh, this was an unintentional error, because I drafted the complaint and I know that I did not mean to state May 1, 1965. There would be no point to alleging that.

MR. BERKOWITZ: But may I ask, what is the date of the last check?

EXAMINER FREDRICKS: You are referring to the checks from teachers to Nelson or the carrier?

MR. BERKOWITZ: Yes.

MR. BYRNE: Also it was stipulated that Capitol received a payment of \$25,000 from the New York State Teachers' Study Group which I believe was dated in June.

MR. BERKOWITZ: That's correct.

MR. BYRNE: And besides, I believe this May 1, 1965, is immaterial.

MR. BERKOWITZ: Might I say, to avoid any misunderstanding, I believe that \$25,000 check, I believe it was indicated in some fashion that it was intended by the New York State Teachers' Study Group for this to apply to

[Tr. 403]

several charters.

Is that so? Is my recollection correct?

EXAMINER FREDRICKS: I looked at that check stub which had been marked BOE 97 for identification.

MR. BYRNE: That's correct.

EXAMINER FREDRICKS: And I think it did indicate three separate charters.

MR. BYRNE: We stipulated that that payment was applied by Capitol.

MR. BERKOWITZ: Merely as to this one charter.

MR. BYRNE: Towards the July 1, 1965 flight.

MR. BERKOWITZ: Yes. That's correct.

MR. BYRNE: So, as I said before, I renew my motion to correct that statement, May 1, 1965. It should be July 1, 1965.

EXAMINER FREDRICKS: You would correct paragraph 9 of the complaint by substituting July 1 for May 1?

MR. BYRNE: That's correct, Mr. Examiner.

EXAMINER FREDRICKS: 1965?

MR. BERKOWITZ: I take no position on that. I leave it to the Examiner.

EXAMINER FREDRICKS: I will grant that motion.

MR. BERKOWITZ: Now, Mr. Examiner, before the record is closed, as you indicated, there was an off-the-record discussion on the question of time for submission of briefs.

[Tr. 404]

I would like the record to note that I also did request an opportunity to reply.

At first my request was that counsel for the Bureau be given as much time as he requests for briefs and I be given the time thereafter to reply, as I do not know and can't possibly know what is intended to be covered or what evidence will be referred to.

Instead you ruled simultaneous briefs by June 20. In that regard you stated that when the briefs are received, if I wanted to, I could make application at that time.

EXAMINER FREDRICKS: Yes, I believe that accurately summarizes that portion of our off-the-record discussion and I added, and I repeat now, that I would consider such an application if you make it, and I don't make any intimation how I would act on it, because my action would depend on whether you advance reasons that persuaded me that a reply opportunity is justified.

MR. BERKOWITZ: May I indicate, I would only request reply if I find new matters not covered in our brief.

EXAMINER FREDRICKS: Yes. Now the record is closed and the hearing is concluded.

(Whereupon, at 5:15 p.m., the hearing was concluded.)

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD.

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 6 1968

Nathan G. Paulson
Clerk

VOLUME II

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[Tr. 405]

CAPITOL AIRWAYS, INC.

EXHIBIT CAP-1

535 Fifth Avenue

YUkon 6-1320

New York, N. Y. 10017

November 9, 1964

Mr. Michael S. Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: New York State Teachers Study Group
New York/Rome, Italy via Paris
July 1, 1965 Paris/New York
September 3, 1965

Docket 16370

Dear Mike:

Enclosed please find Capitol Airways aircraft charter contract and agency agreement for the above mentioned proposed charter flight.

Also enclosed please find CAB forms, certification and advance passenger manifest which are to be completed in triplicate and returned to us. A copy of Part 295 is also enclosed.

Hope you find everything in order.

Very truly yours,

CAPITOL AIRWAYS, INC.

Walt Schofield
Sales Representative

WS:pk
Enc.

[Tr. 406]

STATEMENT OF SUPPORTING INFORMATION*

EXHIBIT CAP-2

Page 1 of 2

PART I - To be completed by air carrier for each single entity, mixed, or pro rata charter. (Where more than one round-trip flight is to be performed under the charter contract, clearly indicate applicability of answers.)

1. Name of transporting carrier: CAPITOL AIRWAYS, INC.
2. Commencement date(s) of proposed flight(s):
 - (a) Going 1 July 1965
 - (b) Returning 3 September 1965
3. Points to be included in proposed flight(s):
 - (a) From New York to Paris
 - (b) Returning from Paris to New York
 - (c) Other stops required by charterer: None
 - (d) Technical stops required by carrier: None
 - (e) Planned routing: New York-Paris
Paris-New York
4. (a) Type of aircraft to be used: DC-8F
 - (b) Seating capacity: 183
 - (c) Number of persons to be transported: 183
5. (a) Total charter price: _____
 - (b) Does the charter price conform to tariff on file with the Board?

 - (c) If pro rata or mixed charter, explain construction of charter price in relation to tariff on file with the Board (In case of mileage tariff, show mileage for each segment involved and indicate whether segment is live or ferry). _____

* This must be retained by the air carrier for two years pursuant to the requirements of Part 249, but open to Board inspection, and to be filed with the Board on demand.

[Tr. 407]

EXHIBIT CAP-2
Page 2 of 2

6. (a) Has the carrier paid, or does it contemplate the payment of any commissions, direct or indirect, in connection with the proposed flight? Yes ☒ No ☐
- (b) If "yes," give names and addresses of such recipients and indicate the amount paid or payable to each recipient. If any commission to a travel agent exceeds 5 percent of the total charter price, attach a statement justifying the higher amount under this regulation.

Nelson Travel Service81 Centre Avenue New Rochelle, New York

7. (a) Will the carrier or any affiliate provide any services or perform any functions in addition to the actual air transportation? Yes ☐ No ☒
- (b) If "yes," describe services or functions: _____

New York State Teachers Study Group

8. Name and address of charterer: 2260 Bronx Park East Bronx, New York
10467

9. If charter is single entity, indicate purpose of flight: _____

10. On what date was the charter contract executed? Issued-January 22, 1965

11. If the charter is pro rata, has a copy of Part 295 of the Civil Aeronautics Board's Economic Regulations been mailed to or delivered to the prospective charterer? Yes ☒ No ☐

[Tr. 408]

CAPITOL AIRWAYS, INC.

Telephone ALpine 6-5115
GENERAL OFFICES--NASHVILLE, TENN.

AIRCRAFT CHARTER CONTRACT NUMBER _____

Between

CAPITOL AIRWAYS, INC.

(hereinafter, and in the Conditions hereafter referred to,
described as "the Carrier")

and

Name NEW YORK STATE TEACHERS STUDY GROUP

Address 2260 Bronx Park East Bronx, New York 10467
(hereinafter, and the said Conditions,
described as "the Charterer")

The Carrier will charter to the Charterer and the Charterer will take on charter the aircraft described in the Schedule below (hereinafter, and in the said Conditions, described as "the aircraft") for the flight, journey, service or period and upon the terms specified in the Schedule subject to the Conditions set out on the back hereof, which the Charterer hereby agrees and accepts.

Charterer, By: /s/ Sari Friedman Carrier, By: /s/ Daniel A. Mitchell Jr.
I. H. Mansfield

Title: Pres - Director Title: Director of Sales
(Authorized Official of (Capitol Airways Official Only)
Chartering Organization)

Date: _____ Date: November 6, 1964

SCHEDULE

Aircraft type DC-8F for not more than 183 passengers (including Infants, if any) and 44 pounds of baggage each, and/or, -0- pounds of cargo.

Aircraft Routing, Flight Schedule and Charges

	From	Date	Time	To	Date	Time
1.	New York	July 1, 1965		Rome, Italy via Paris, France		
2.	Paris	Sept. 3, 1965		New York		

Charter Price or Rate \$ 52,331.00

Other Charges _____

Total Charges \$ 52,331.00

Total Charges Payable as follows: 10% signing contract 5,233.10

1. 10% on _____ within 60 days " " \$ 5,233.10

2. 40% additional on March 1, 1965 20,932.40

3. Balance of Charges on May 1, 1965 20,932.40

Total Charges \$ 52,331.00

Make All Checks Payable to Capitol Airways, Inc.

[Tr. 409]

CONDITIONS

1. Deviation from any of the terms set out in the Schedule through the action or at the request of the Charterer may involve alteration in the charter price.
2. All expenses of operating the aircraft, operating costs, maintenance and repair expenses, airport dues and hangarage charges, are included in the charter price.
3. This contract is subject to all applicable tariffs and tariff rules of the Carrier on file with the U. S. Civil Aeronautics Board and is subject to such governmental approvals as may be required under applicable law to permit the Carrier to furnish the transportation contracted for herein.
4. The Captain of the aircraft shall have complete discretion concerning the load carried and its distribution, as to whether or not a flight should be undertaken, and as to where landings should be made, and the Charter shall accept all such decisions of the Captain.
5. For all carriage to which the Federal Aviation Act of 1958 as amended, is applicable, the Carrier and the Charterer will use his best endeavours to ensure that all the provisions of the said Act and all the obligations of the Carrier thereunder are duly observed.
6. The Carrier exerts every effort to avoid delay and to adhere to the established schedule, however, the Carrier shall not be responsible for delay or prevention of the completion of this charter arising from any of the following: riots, strikes, lockouts, civil commotions, interference by any government authority, acts of war, blockade, acts of God, sanctions (financial or otherwise), fire, flood, fog, frost, ice, storms (including

unusually severe weather conditions), epidemics, quarantine, requisitions of the aircraft or cargo breakdown or accident to the aircraft (not resulting from lack of due diligence) or any other cause whatsoever beyond the control of the Carrier. The times of departures and arrivals shown in charter schedules indicate approximate times and form no part of the contract of carriage.

7. Operating personnel are authorized to take orders only from the Carrier, unless specific agreement has been made between the parties whereby certain defined instructions may be accepted by operating personnel from the Charterer.

8. If any delay in the commencement or completion of the charter is caused by the Charterer or anyone acting on his behalf, demurrage shall run against the Charterer for such delay.

9. The Charterer is not entitled to assign this Agreement to any other party without the consent of the Carrier or to subcontract any part of the services contemplated hereunder.

10. The Charterer will comply, and cause all passengers and owners of Cargo carried to observe and comply, with all Customs, Police, Public Health and other Regulations which are applicable in States in which landings are made.

11. The rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, Poland, on October 12, 1929, and all the provisions thereof and all other applicable laws, shall apply to the carriage hereof insofar as the same is governed thereby. Except as otherwise provided in applicable laws the Carrier accepts no liability whatsoever for death, injury or delay of passengers or loss or damage to or delay of their baggage or for loss or damage or delay in the delivery of cargo.

12. This Agreement may be terminated and cancelled forthwith by the Carrier by notice to the Charterer

- (a) if the Charterer commits any breach of this Agreement
- (b) if the Charterer goes bankrupt (or if a company goes into liquidation) or commits an act of bankruptcy or enters into an arrangement with his creditors.

13. In the event of the inability of the Carrier to perform or complete any Domestic U. S. flight, journey or service contemplated by this Agreement in accordance with the schedule, Carrier will provide adequate housing and meals for the delayed passengers. The Carrier reserves the right to provide substitute transportation of equal quality, in the event such inability to perform any flight, journey or service occurs. On all charter flights bound from a point outside the continent where the charter originated to the point where it terminates, unless the air carrier causes an aircraft finally to emplane each passenger and commence the take-off procedures at the airport of departure before the forty-eight hour following the time scheduled for the departure of such flight, it shall provide substitute transportation in accordance with the provisions of this subparagraph.

(ii) As soon as the air carrier discovers or should have discovered by the exercise of reasonable prudence and forethought, that the departure of any such charter flight will be delayed more than forty-eight hours, such air carrier shall arrange for and pay the costs of substitute air transportation for the charter group on another charter flight, operated by any other air carrier or foreign air carrier.

(iii) When neither the charter transportation contracted for nor substitute transportation has been performed before the expiration of forty-eight hours following the scheduled departure time of any such charter flight, the charterer, or his duly authorized agent, may arrange for substitute air

transportation of the members of the charter group, at economy or tourist class fares, on individually ticketed flights and the chartered air carrier shall pay the costs of such air transportation to the substitute air carrier or foreign air carrier.

(iv) In determining the period of time during which the departure of a charter flight has been delayed within the purview of this subparagraph, periods of delay caused by the prohibition of flights from the airport of departure because of weather or other operational conditions shall be excluded if, and while, the air carrier had an airworthy aircraft which is capable of transporting the charter group in a condition of operational readiness posted at such airport..

(2) Incidental expenses.

(i) On all charter flights bound from a point outside the continent where the charter originated to the point where it terminates, unless the air carrier causes an aircraft finally to enplane each passenger and commence the take-off procedures at the airport of departure before the sixth hour following the time scheduled for the departure of such flight, it shall pay incidental expenses in accordance with the provisions of this subparagraph. Such payments shall be made at the airport of departure as soon as they become due to the charterer, or its duly authorized agent, for the account of each passenger, including infants and children traveling at reduced fares.

(ii) Such payments shall be made at the rate of \$16.00 for each full twenty-four hour period of delay following the scheduled departure time. However, the sum of \$8.00 shall be paid for each passenger delayed during all, or any portion, of the initial period of six hours following the scheduled departure time. Thereafter, during the succeeding 18 hours of delay, an additional sum of \$8.00 shall be paid for each passenger

delayed in installments of \$4.00 for the first and second succeeding six-hour period of delay, or any fractional part thereof. If the delay continues beyond a period of 24 hours following the scheduled departure time, such payments shall be made in equal installments of \$4.00 for each further six-hour period of delay, or any fractional part thereof. Provided, however, That the air carrier may, at its option, discharge this obligation by providing free meals and lodging in lieu of making such payments. The obligation of the air carrier to pay incidental expenses or provide free meals, and lodging shall cease when substitute air transportation is provided in accordance with the provisions of subparagraph (c)(1) of this policy statement.

14. This Agreement is entered into by the Charterer both on his own behalf and as agent for all persons and the owners of all goods carried in the aircraft.

15. If the Carrier, or Assigns, is required to bring any action or suit to recover payments due under the terms of this Charter, or to enforce any of its rights or the obligations of the Charterer, the cost thereof, including reasonable attorney's fees, shall be borne by the Charterer.

16. In the event of the Charterer cancelling this agreement the Charterer shall pay 10% of the charter price if cancellation is given more than 60 days after date of contract or within 60 days of date of departure, providing that Charterer is not cancelling to use the services of another carrier in which case 10% of charter price will be retained by carrier as damages which would be suffered due to inability to sell equipment reservations to another charterer.

17. This Agreement shall be construed according to the law of the District of Columbia.

[Tr. 410]

EXHIBIT BOE 2

CAPITOL AIRWAYS, INC.
General Office
Municipal Airport
Nashville, Tennessee
Area Code 615
255-0673
Cables: FLYCAPITOL

CHARTER AGENCY AGREEMENT

This agreement made this 6 day of November 1964, between Capitol Airways, Inc.
hereinafter referred to as "Carrier" and NELSON TRAVEL SERVICE
Name

81 Centre Avenue New Rochelle, New York
Address

hereinafter referred to as "Agent."

WHEREAS, Carrier wishes to appoint Agent to solicit and develop aircraft
charter traffic on its behalf; and

WHEREAS, Agent wishes to be appointed Agent to solicit and develop aircraft
charter traffic for the following principal charter (s):

NEW YORK STATE TEACHER STUDY GROUP

Name of charterer

2260 Bronx Park East Bronx, New York 10467

Address of charterer

NY/Rome, Italy via Paris, France--July 1, 1965--Paris/New York September
Charter Service origin, destination, and service dates
3, 1965

NOW THEREFORE, it is mutually agreed by and between the parties hereto as
follows:

1. Carrier appoints and the Agent accepts appointment to solicit and develop
the charter traffic identified above and more fully identified in the re-
spective Aircraft Charter Contract(s) and Agent agrees to perform faith-
fully all services subject to the terms of this agreement.
2. This agency agreement is limited in its entirety to the charter(s)
identified above and will expire at the completion or cancellation of
such service.

3. Carrier agrees to pay to Agent and Agent agrees to accept from Carrier as full payment for all services rendered by Agent to carrier a commission of 5% of the base tariff charges for transportation services for the traffic described above and actually performed.
4. Carrier agrees to pay the commission described above to Agent within ten days after payment in full is received by carrier for each contract. It is agreed between Carrier and Agent that such commission is payable only for that transportation service which is performed for the Charterer(s) and that for any charter cancelled in full or in part such proportionate commissions as may have been paid in advance to agent are refundable to the carrier on demand.
5. Agent agrees to represent the carrier with the charterer as directed by the carrier or by the Civil Aeronautics Board in the completion and transmission to the carrier and/or the Civil Aeronautics Board of all documents required for the charter service by the carrier or by the Civil Aeronautics Board. Agent also agrees to furnish such documents to such interested persons as may be required by the laws of any foreign government. For Transatlantic Charters agent further agrees to abide by the provisions of the Transatlantic Charter Rules or Regulations of the Civil Aeronautics Board and/or any rules or regulations issued by the said Civil Aeronautics Board relating to the operation of charter services by supplemental air carriers.
6. Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name.

7. This agreement constitutes a personal contract and may not be transferred or assigned by Agent without Carrier's prior written consent.
8. Either party may terminate this agreement for cause upon failure of the other party to comply immediately with the terms of this agreement after written notice of violation of such terms is mailed to the address of the other party.

IN WITNESS WHEREOF the parties hereto have duly executed this agreement the day and year first above written.

Agent:

CAPITOL AIRWAYS, INC.
Nashville, Tennessee

NELSON TRAVEL SERVICE

Name
81 Centre Avenue New Rochelle, New York

Address
/s/ Michael S. Friedman

Signature
President

Title

/s/ Daniel A. Mitchell, Jr.
I. H. Mansfield

Signature
Director of Sales

Title

FORM S-11

[Tr. 411]

EXHIBIT BOE 3

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

November 9, 1964

Mr. Michael S. Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: New York State Teachers Study Group
New York/Rome, Italy via Paris
July 1, 1965
Paris/New York September 3, 1965

Dear Mike:

Enclosed please find Capitol Airways aircraft charter contract and agency agreement for the above mentioned proposed charter flight.

Tr. 411

-418 -

Also enclosed please find CAB forms, certification and advance passenger manifest which are to be completed in triplicate and returned to us. A copy of Part 295 is also enclosed.

Hope you find everything in order.

Very truly yours,

CAPITOL AIRWAYS, INC.

/s/ Walt Schofield

Walt Schofield
Sales Representative

WS:pk
Enc.

(Handwritten note):

[Walter

I will not be able to send accompanying check until Dec. 10th.

/s/ Mike]

[Tr. 412]

EXHIBIT BOE 4

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

December 29, 1964

Mr. Mike Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: New York State Teachers Study Group
New York/Rome via Paris July 1, 1965
Paris/New York Sept. 3, 1965

Dear Mr. Friedman:

Enclosed please find countersigned contracts and agency agreement for the above mentioned flight.

This will acknowledge receipt of your agency's check in the amount of \$5,233.10, which will act as deposit on this flight.

Please note that a second 10% deposit is due within 60 days of the above date.

Trust the above meets with your approval.

Very truly yours,

CAPITOL AIRWAYS, INC.

Daniel A. Mitchell, Jr.
District Sales Manager

PK
Enc.

[Tr. 413]

EXHIBIT BOE 5

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

January 4, 1965

Mr. Michael Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: New York State Teachers Study Group
NY/Rome via Paris July 1, 1965
Paris/NY September 3, 1965

Dear Mike:

In accordance with your secretary's request of this morning, we are returning herewith, your agency's check #374 in the amount of \$5,233.10, which was to have acted as deposit on the above mentioned charter flight.

It is our understanding that we will be receiving a check in the same amount directly from the charterer within a few days.

Trust you will find the above satisfactory.

Very truly yours,

CAPITOL AIRWAYS, INC.

Daniel A. Mitchell, Jr.
District Sales Manager

PK
Enc. #374

[Tr. 414]

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

January 14, 1965

Mr. Michael Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: New York State Teachers Study Group
NY/Rome via Paris July 1, 1965
Paris/New York September 3, 1965

Dear Mr. Friedman:

This will serve to acknowledge receipt of your check #542 in the amount of \$5,281.00 which will serve as the first 10% deposit on the above mentioned flight.

Thank you for your continued cooperation.

Very truly yours,

CAPITOL AIRWAYS, INC.

Daniel A. Mitchell, Jr.
District Sales Manager

PK

[Tr. 415]

EXHIBIT BOE 7

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

March 5, 1965

Mr. Michael S. Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: N.Y.S.T.S.G.
July 1, 1965 JFK/PAR/ROM
Sep. 03, 1965 PAR/JFK

Dear Mr. Friedman:

We wish to remind you that payment on the above reference charter flight in the amount of \$20,932.40 was due on March 1, 1965.

I'm sure that this have been an oversight on your part in remitting and we would appreciate receiving your check by return mail.

Thanking you for your kind cooperation in this matter, we remain,

Very truly yours,

CAPITOL AIRWAYS, INC.

/s/ Daniel A. Mitchell, Jr.

Daniel A. Mitchell, Jr.
District Sales Manager

DAM:pk

[Tr. 416]

EXHIBIT BOE 8

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

March 31, 1965

Mr. Michael S. Friedman
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: N.Y.S.T.S.G.
July 1, 1965 JFK/PAR/ROM
Sept. 3, 1965 PAR/JFK

Dear Mr. Friedman:

Please refer to my letter to you dated March 5, 1965 wherein I requested payment of \$20,932.40 due at the beginning of this month.

It is realized that your payments from the group is not coming in as fast as you have anticipated however we suggest that you make some attempt to hasten payment and forward same to us.

Thank you for your kind cooperation, we remain,

Very truly yours,

CAPITOL AIRWAYS, INC.

/s/ Daniel A. Mitchell, Jr.

Daniel A. Mitchell, Jr.
District Sales Manager

DAM:pk

[Tr. 417]

EXHIBIT BOE 9

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

April 30, 1965

Mr. Michael S. Friedman
President
Nelson Travel Service
81 Centre Avenue
New Rochelle, New York

Re: N.Y.S.T.S.G.
7/1/65 JFK/PAR/ROM
9/3/65 PAR/JFK

Dear Mr. Friedman:

In spite of my letters to you dated March 5th and March 31st, 1965, and my many telephone conversations regarding payment we have still not received the \$20,932.40 which has been due since the 1st of March, 1965.

As per our telephone conversation of the other day kindly see to it that this check is forwarded immediately.

Thanking you for your cooperation, we remain,

Sincerely yours,

CAPITOL AIRWAYS, INC.

/s/ Daniel A. Mitchell, Jr.

Daniel A. Mitchell, Jr.
District Sales Manager

DAM:pk

[Tr. 418]

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
Yukon 6-1320

May 11, 1965

Mr. Michael S. Friedman
President
Nelson Group Travel Corp.
81 Centre Avenue
New Rochelle, New York

Re: N.Y.S. Teachers Study Group
NY/Rome via Paris July 01, 1965
Paris/NY September 03, 1965

Dear Mr. Friedman:

This will serve to acknowledge receipt of your agency's check
#406 in the amount of \$20,932.40.

This will also serve to reiterate that we have extended the date
for final payment to June 01, 1965.

Thanking you for your continued cooperation, we remain,

Very truly yours,

CAPITOL INTERNATIONAL AIRWAYS

Daniel A. Mitchell, Jr.
District Sales Manager

PK

[Tr. 419]

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

May 27, 1965

Mr. Michael S. Friedman
President
Nelson Group Travel Corporation
81 Centre Avenue
New Rochelle, New York

Re: N.Y. S.T.S.G.
7/1/65 JFK/PAR/ROM
93/65 PAR/JFK

Dear Mr. Friedman:

We have just been advised by our home office in Nashville, Tennessee that you have stopped payment on the check issued to us in the amount of \$20,932.40 numbered 406..

Kindly contact me upon receipt of this letter so that we may arrange to have the check re-issued. It is my understanding from your secretary that the check was drawn from the wrong account and another will be forthcoming.

In view of this, we would appreciate receiving a certified check to replace the above check.

Trusting in your cooperation, we remain,

Sincerely yours,

CAPITOL AIRWAYS, INC.

/s/ Daniel A. Mitchell, Jr.

Daniel A. Mitchell, Jr.
District Sales Manager

DAM:pk

30 502 REV. 6-63

DEBIT ADVICE

FIRST NATIONAL CITY BANK

399 PARK AVENUE, NEW YORK, N. Y. 10022

DATE 5/21/65

WE DEBIT YOUR ACCOUNT FOR RETURN ITEMS HERewith ENCLOSED UNLESS OTHERWISE INDICATED BELOW. THE REASON FOR NON-PAYMENT IS INDICATED ON EACH ITEM.

☐ ENTERED FOR COLLECTION.

MA
A
I
T
O

00068806
CAPITOL AIRWAYS, INC.
BERRY FIELD
NASHVILLE, TENNESSEE

05100

BPNF

TOTAL

\$20,932.40

PLEASE RETAIN THIS ADVICE FOR RECONCILEMENT PURPOSES.

DOMESTIC COLLECTION DEPARTMENT
RETURN ITEMS SECTION

Tr. 421

[Tr. 421]

- 426 -

EXHIBIT BOX 13

[Tr. 422]

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

June 10, 1965

Mr. Michael S. Friedman
President
NELSON GROUP TRAVEL CORP.
81 Centre Avenue
New Rochelle, New York

Re: N.Y.S.T.S.G.
July 1, 1965
Sept. 03, 1965

Dear Mr. Friedman:

This will serve to acknowledge receipt of your groups' certified check #792 in the amount of \$25,000.00 which will be applied toward payment on the above mentioned charter flight.

As of this date we show a final payment due in the amount of \$16,864.80.

Thanking you for your cooperation, we remain,

Very truly yours,

CAPITOL AIRWAYS, INC.

Daniel A. Mitchell, Jr.
District Sales Manager

PK

P.S. Please be sure to return the completed C.A.B. forms
for this charter as soon as you can.

EK

Tr. 423.

- 428 -

EXHIBIT BOB 15

[Tr. 423]

[illegible]

COIN

key

100

50

20

10

5

2

1

X X X X X X X

[Tr. 424]

EXHIBIT BOX 16

SF 3107 REV. 11-61**R**

ACCOUNT NUMBER 6026-8806
FOR ACCOUNT OF Capitol Guaranty Inc
(PLEASE PRINT FULL TITLE) Insurance

DATE February 9 1965
 DEPOSITED WITH
FIRST NATIONAL CITY BANK
 NEW YORK

PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS, USING SEPARATE FORM IF ADDED.

CHECK COUNT
3

TOTAL

		FOR EXHIBIT 6	
		DOLLARS	CENTS
CASH			
CHECKS	50-1571	1044	75
(No Separately)	50-157 2	1044	75
	50-157 3	5185	20
	4		
	5		
	6		
	7		
	8		
	9		
TOTAL			

TELLER'S CO.

1. Present Owners of Rochester (Agent) (3) MySTSG (1965) ✓
2. 5 R & W. W. (Agents) (Agent)

TELLER'S COPY

[Tr. 425]

EXHIBIT BOB 17

CASH		
CHQ.		
DEPOSIT	100-100	100-100
TOTAL	100-100	100-100

FIRST NATIONAL CITY BANK
MEMPHIS, TENN.

(Stop Payment) & return!

BARRY FIELD Nashville, Tennessee

N.Y.S.T.S.C. (a)

FOODLABOR

25-

[Tr. 426]

EXHIBIT BOE 18

PLEASE USE THIS TICKET FOR MAKING UP POSITION PERSON OR BY
MAIL. WHEN MAKING DEPOSIT, WRITE "FOR DEPOSIT ONLY" ON
CHECKS BEFORE ENDORSING AND FILL IN AMOUNT BELOW AND
REGISTERED MAIL FOR RETURNS CONTAINING: BANK OF CANADA

DATE June 22 1944

DEPOSITED WITH
FIRST NATIONAL CITY BANK
NEW YORK

CASH 1-30

CHECKS
"Not Specified"

	DOLLARS	CENTS
1	22	00
2	00	00
3	00	00
4	00	00
5	00	00
6	00	00
7	00	00
8	00	00
9	00	00
TOTAL	22	00

CAPITAL ACCOUNTS ARE
Barry Field Nashville, Tennessee
N.Y.S.T.S.C. July-Sept 1
certified 522008 0792 (c)

FOODLBR012

~~Capital~~ Capitol Airways, Inc

DATE July 1, 1965.

1992

PLATE 104C

CHRONIC 157

RETRND TO: JFK/Paris?Rome

Page 1

183

PROJECT WEA 314

DATE MADE & BY:

TELETYPE UNIT
 TELETYPE UNIT
 TELETYPE UNIT

[illegible]

AIR PASSENGER MANIFEST

CAPITOL AIRWAYS, INC.

TRIP NO.

CLASS

DATE

FLIGHT NO.

ORIGINATED AT

PAGE 2

PAGE 3

FLIGHT NO. 314

ENROUTE TO Paris/Rome

EMBARKING AT
DESTROYED TO:

THE DATE 1. DATE

LINE NO.	NAME OF PASSENGER LAST FIRST MIDDLE FULL NAME AND ADDRESS	AGE	SEX	REL.	NATIONALITY PASSPORT NO. & DATE IF NO PASSPORT SEE NOTE 2	ORIGINATED SEE NOTE 3	WEIGHT LBS.	HEIGHT INCHES
1	Delmastro, Angelo				Rome	165	1	30
2	Draizin, Stephen					172	1	40
11	Draizin, Dorothy					174	1	30
4	Eisenberg, Stanley				Rome	165	1	30
11	Evans, Sybil				Rome	135	1	50
6	Fidler, Bo					162	3	
7	Fidler, Anneline with INFANT					135		80
8	Festinger, Laura				Rome	170	4	160
9	Festinger, Martin				Rome	140		
13	Festinger,				Rome	100	1	
14	Festinger				Rome	80		
15	Forsai, Joseph				Rome	172	1	38
16	Garcia, Gomez, Gorge					157	1	41
14	Gilgan, James					159	1	39
18	Gilbert, John					161	7	40
19	Goldstein, Leonard					192	2	40
17	Goldstein, Gyendolen					113	1	38
22	Goldstein, Richard					170	1	51
19	Grango, Thomas					199	1	50
20	Grayson, Marilyn					126	2	40
21	Ghnan, Joan					111	1	30
22	Gargiulo, Mary				Rome	133	1	34
27	Geller, Irene				Rome	106	4	
24	Geller, mother				Rome	121		
25	Geller, father				Rome	189		100
26	Hippleman, Warren					179	2	50
27	Hofmann, Richard					160	1	40
28	Hookhouser, Jack					181	2	40
29	Born, Elayne					132	1	30

- 432 -

Tr. 429

[Tr. 429]

DOE EXHIBIT 21

AIR PASSENGER MANIFEST CAPITOL AIRWAYS, INC.

TRIP NO.:

CARRIER:

RYSTEG

DATE: 7/1/65

PLANE NO.:

ORIGINATED AT:

DESTINED TO: Paris/Rome

PAGE

3

OF

PAGES

FLIGHT NO. 314

SEE NOTE 1. DATED

PASSENGER'S NAME LAST FIRST FULL NAME AND ADDRESS		TICKET NO.	AGE	SEX	REL.	NATIONALITY PASSPORT NO. & DATE IF NO PASSPORT SEE NOTE 2	CHECKED IN DATE & TIME	NO. BAGG.	WE LBS.
1.	Ibberson, Madeleine						120	2	
2.	Iorio, Pasquale						55	1	
3.	Joffe, Blanche						110	1	
4.	Jacoby, Hyman						185	2	
5.	Jacoby, Wife						122		
6.	Jaglinshy, Wloff						155	1	
7.	Kanuck, Michael						192	3	
8.	Kanuck, Geraldine						126		
9.	Kirby, Ray						155	2	
10.	Kosinska, Aniela						118	1	
11.	Karkenny, Wardy						134	1	
12.	Kass, Bodonna						126	1	41
13.	Kellerhals, Joan						118	1	
14.	King, Karen						130	1	
15.	Klaw, Robert						142	1	
16.	Katross, Rhoda (Passport ?)						140	1	40
17.	Latorre, Teresa	12					121	3	
18.	Latorre, Maria	13					115		
19.	Lechman, Florence						135	4	
20.	Lembo, Anthony						132		
21.	Lembo, Pia						105	1	
22.	Lufrano, Carmella						142	5	
23.	Lufrano, Anthony						155		
24.	Lufrano, John						105		
25.	Lufrano, Leonard						95		
26.	Lufrano, Christine						65		
27.	Lundo, Wei						95	1	42
28.	Leser, Fred						159	3	
29.	Leser, Sandra						123		

AIR PASSENGER MANIFEST
CAPITOL AIRWAYS, INC.

TRIP NO.: PLANE NO.: FLIGHT NO.: 314
ORIGINATED AT: CINCINNATI
DESTINED TO: Paris/Rome
DATE: 7/1/65
PAGE: 4 OF 5

PASSENGER NAME LAST FIRST MIDDLE INITIAL				AGE	SEX	REL.	NATIONALITY PASSPORT NO. & DATE OF ISSUANCE SEE NOTE 2	COCKPIT SEE NOTE 3	TD.	TD.
1.	Leser, Jacquene								85	-
2.	Lundberg, Ronald								189	3
3.	Lundberg, Barbara								123	1
4.	McCart, William								196	1
5.	Mackenzie, John								156	5
6.	Mackenzie, Dorothy								114	1
7.	Mackenzie, Jean								85	1
8.	Mackenzie, Ellen								90	1
9.	McElroy, Hugh								145	1
10.	Malen, Lynn								116	1
11.	Manne, Louis								187	2
12.	Manne, Susan								121	1
13.	Malouche, Lucille								125	1
14.	Malouche, Lea								119	1
15.	McEntegart, Marilyn								130	1
16.	Merian, Leon								121	1
17.	Miller, Chester	EASTBOUND ONLY							103	3
18.	Miller, Sonja	EASTBOUND ONLY							120	1
19.	Marinangeli, Morgot	MC					Rome		155	2
20.	Marinangeli, Micheal	MC					Rome		150	1
21.	Miller, Frank						Rome		145	1
22.	Monnin, Walter						Rome		120	2
23.	Norton, Roberta								123	1
24.	Nudell, Seymour								169	3
25.	Nudell, Bernice								99	1
26.	Nagle, Lorraine						Rome		130	1
27.	Nantista, Josephine						Rome		121	1
28.	Neschis, Sid						Rome		181	3
29.	Neschis, Renee						Rome		116	1

Tr. 431

[Tr. 431]

BOX EXHIBIT 23

AIR PASSENGER MANIFEST
CAPITAL AIRWAYS, INC.

DATE 7/1/65

TRIP NO.

CARRIER

FLIGHT NO.

ORIGINATED AT

FLIGHT NO. 314

DESTINATED TO Paris/Rome

PAGE 5 OF

PAGES

REMARKS (S)
REMARKS TO:

SEE PAGE 4. DATE

1	NAME IN FULL FAMILY NAME FULL PERMANENT ADDRESS	OWNED NAME TICKET NO.	AGE	SEX	R. C.	NATIONALITY PASSPORT NO. & DATE OF AND PLACE OF ISSUE	WEIGHT SEE NOTE 8	HAIR COLOR	YES NO
1	Pardi, Caroline						116	2	40
2	Pedoto, Joseph						183	1	40
3	Plaggemeier, Arthur						145	3	
4	Plaggemeier, Elke						115		78
5	Paternostro, Rose Marie					Rome	161	2	42
6	Perimutter, Frieda					Rome	143	1	28
7	Rfalster, Gail					Rome	150	1	2
8	Picariello, Antionette					Rome	108	1	32
9	Potenza, Salvatore	MC				Rome	140	3	
10	Potenza, Maria	MC				Rome	150	1	96
11	Ray, Frank						155	4	
12	Ray, Lucinda with <u>INFANT</u>						110		
13	Ray, Nancy						85		10
14	Reisman, Philip					Rome	160	2	10
15	Reisman, Louise					Rome	112		
16	Rigamonti, Bother Alvin	RS				Rome	185	2	40
17	Rosen, Natalie					Rome	12	2	
18	Rosen, Albert					Rome	185		50
19	Robin, Barbara					Rome	119	1	32
20	Russell, Helen	MC					110	1	36
21	Sampson, Clinton						160	1	40
22	Santanello, Joseph						168	4	1
23	Santanello, Jaqueline						130		
24	Santanello, Kathleen						90		
25	Santanello, Michelle						75	1	100
26	Schaefer, Ermlut						142	3	
27	Schaefer, Emily						19		46
28	Spodheim, Renee						57		51
29	Stahle, Yvonne	WESTGUND ORIGIN							

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Tr. 432

[Tr. 432]

AIR PASSENGER MANIFEST CAPITOL AIRWAYS, INC.

BOX EXHIBIT 24

TRIP NO:

CLASS

DATE 7/1/65

FLIGHT NO:

ORIGINATED AT

PAGE 6 OF

PAGES

FLIGHT NO. 314

DESTINED TO: Paris/Rome

EXPLANATIONS (SEE
DESTINED TO:

SEE NOTE 1. DATE:

1	NAME OR FULL FAIRLY NAME FULL SURNAME ADDRESS	AGE	SEX	REL.	NATIONALITY PASSPORT NO. & DATE IF NO PASSPORT SEE NOTE 2	OCCUPATION SEE NOTE 3	NO. DATE	TP. EX.
1	Walt, Barbara						100	3
2	Shain, Mack				Rome		100	4
3	Shain, Ruth				Rome		100	5
4	Shain, Dorian				Rome		85	6
5	Shapiro, Sam				Rome		100	7
6	Short, Bryan	25			Rome		100	8
7	Snyder, Esther				Rome		100	9
8	Sonders, Joy				Rome		100	2
9	Stein, Philip				Rome		100	0
10	Stein, Leocora				Rome		100	1
11	Stein, Judith Ann				Rome		95	1
12	Stein, Lois				Rome		100	2
13	Suss, Hedi				Rome		100	3
14	Sorola, Susan	70					100	3
15	Santopietro, Grace	20					100	1
16	Tei, Carlotta				Rome		100	3
17	Tei, Emilio				Rome		100	1
18	Trachtenberg, Mila				Rome		100	1
19	Victor, Jeffrey						100	1
20	Victor, Richards	WEST DEPT. ONLY					100	1
21	Waks, Meyer						100	3
22	Waks, Beatrice						100	1
23	Wolfenstein, Stephen						100	1
24	Zwickel, Arthur						100	5
25	Zwickel, Miriam						100	1
26	Zwickel, Steven						100	1
27	Zwickel, Susan						100	1
28	Zamichow, Abraham				Rome		100	3
29	Zamichow, Florence				Rome		100	1

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PAGE 7 OF

SEE PAGE 1. DATE:

[illegible]

[Tr. 434]

NEW YORK STATE TEACHERS STUDY GROUP, INC.
2260 Bronx Park East
Bronx, New York 10467

IMPORTANT: YOUR BOARDING NUMBER IS 92 B.I.

FINAL INSTRUCTIONS FOR NEW YORK STATE TEACHERS STUDY GROUP, INC.

CHARTER FLIGHT #2 AND #3 (CAPITOL AIRWAYS, INC. FLIGHT # 521

DEPARTURE: From NEW YORK - THURSDAY, JULY 1, 1965 9:00 P.M.

TERMINAL: RIVIERA HOTEL (AT KENNEDY AIRPORT), LOWER LOBBY

Belt Parkway at Baisley Boulevard (directions enclosed)

TIME OF CHECK-IN: Numbers (see above) 1 - 63 at 5:45 P.M.

64 -125 at 6:30 P.M.

126 - 183 at 7:15 P.M.

PLEASE BE SURE TO MENTION, WHEN CHECKING IN, WHETHER PARIS OR ROME IS
YOUR DESTINATION, AND BE SURE THAT CORRECT DESTINATION TAGS ARE PUT ON
YOUR LUGGAGE BY THE CHECK-IN AGENT.

(Please arrive on time and check in with members of your party).

TIME OF ARRIVAL IN PARIS: Friday July 2, 1965 at 10:45 A.M. Paris time

AIRPORT: Le Bourget

SHORT LAYOVER IN PARIS TO ALLOW PARIS PASSENGERS AND BAGGAGE TO DISEMBARK

TIME OF ARRIVAL IN ROME: Friday, July 2, 1965 at 2:30 P.M. Rome time

AIRPORT: Fumicino

* * * * *

DEPARTURE FROM PARIS (all passengers) FRIDAY, SEPTEMBER 3, 1965 at
11:00 A.M. Paris time.

PARIS AIRPORT: Le Bourget

CHECK-IN AT LE BOURGET: at least two hours before flight time - observe
same boarding numbers. Leave yourself \$5.00

for Paris departure airport tax, compulsory
for all transatlantic passengers whether charter
or commercial.

ARRIVAL IN NEW YORK: FRIDAY, SEPTEMBER 3, 1965 AT 1:30 P.M. N.Y. time
Kennedy Airport, International Arrivals Building.

NOTE: It is not necessary to reconfirm flight in Paris. Call Le Bourget
Airport - Charter Service the day prior to departure.

Telephone: AVIA - 0854

BAGGAGE: 44 pounds per person - overweight will not be accepted.

FLIGHT TICKETS: NO flight tickets will be issued. Your name is on the
manifest, and when you check in at the airport you will
be issued a boarding pass. Retain this boarding pass
for your return flight.

PLEASE CARRY YOUR MEMBERSHIP CARD WITH YOU.

DO NOT FORGET YOUR PASSPORT AND SMALL POX VACCINATION (yellow) CARD.

[Tr. 435]

EXHIBIT BOE 27

NEW YORK STATE TEACHERS STUDY GROUP, INC.
2260 Bronx Park East
Bronx, New York 10467

PRE-FLIGHT MEETING NOTICE

Date: Saturday, June 19, 1965

Time: (please observe time period for your flight)

10 a.m. Charter #4 London round trip 7/18-8/29 BE 7/25-8/29 90 x \$76

10:45 a.m. #5 Orient Charter and tours

CAP 12 noon #1 London: - Paris 7/2 - 9/4 and Grand European Tour

CAP 1:00 P.M. #2 & #3 Paris and Rome 7/1-9/3 CAPITOL

CAP 1:45 P.M. #6 & #7 Paris and Rome 7/4-9/5

MR. BOURNE

Place: YMCA - 224 East 47th St., New York 17, N.Y. PL 5-2410 PROGRAM OFFICE
(between 2nd and 3rd Avenues)
East Room

MR. SMITH

NOTE: It is not essential to attend. You have all the pertinent information. The meetings review charter instructions and give you a chance to meet with "fellow travelers".

Tr. 436.

570 21

PAID - N.Y.
SEPT. 4TH

W.Y. - Leonard
Jen Y vno

乙

[illegible]

#1 Lond-Axis

		Date	Amt	Date	Amt	Date	Amt	Cancel
32	Shelia Lye Datta	1/15/65	100	2/13/65	370			100
33	Donall J. Cairns	1/16/65	510					510
34	W. Susan S.							270
35	Elizabeth R. D. Gineau	1/25/65	100	4/1/65	70			270
36	Audrey D. Perote	2/1/65	100	4/2/65	70			270
37	Freda E. Haierang	1/28/65	200	4/5/65	70			270
38	Linda Mary Pfiech (wife)	1/28/65	200	4/5/65	70			270
39	Stephanie San Marco	1/28/65	200	4/5/65	70			270
40	Edith Glackman	2/2/65	200	4/5/65	70			270
41	Patricia Alice Woodruff	2/2/65	540					270
42	Eileen Woodruff							270
43	Carole K. Christopher	2/10/65	200					200
44	Martin Blum	1/30/65	200	2/6/65	140			270
45	Helen M. Blum							270
46	Gayl B. Minceu	1/30/65	100	4/5/65	70			270
47	Dorothy K. Day	1/25/65	200	4/6/65	140			270
48	Allen Robert Day	2/4/65	200					270
49	Agnes A. Johnston	1/13/65	100	4/1/65	70			270
50	William Chy Bricker	1/13/65	100	4/1/65	70			270
51	Alice H. Feinberg	1/21/65	100	4/1/65	70			270
52	Marion Ventosa	1/22/65	100	4/1/65	70			270
53	Ann Dancu	1/17/65	100	4/1/65	70			270
54	Frederic Carrau	1/20/65	100	4/1/65	70			270
55	Harold Goussard	1/21/65	100	4/5/65	70			270
56	Suzanna Newboud	1/22/65	100	4/5/65	70			270
57	Rita Havini	1/27/65	100	5/1/65	70			270
58	Leon Ann Kaus	1/15/65	100	4/2/65	70			270
59	Joyce Ernst	1/27/65	100	4/2/65	70			270
60	Mary E. Haugner	1/27/65	100	4/4/65	70			270

#1. Lono-Paeis

		Date	Am	Date	Am	Date	Am	Carell
61	Josep Horacio	2/1/65	100			2/1/65	70	270
62	MONTAGUE DARR	2/1/65	200			2/1/65	70	270
63	FRANCIS GARRA	2/1/65	100			2/1/65	70	270
64	JENNIFER GARRA	2/1/65	200			2/1/65	70	270
65	ROBERT DE VITO	2/1/65	100			2/1/65	70	270
66	H. ZONE BURELACCH	2/1/65	200			2/1/65	70	270
67	JOHN LAMAZ	2/1/65	100			2/1/65	70	270
68	W. RUTH A. LOVIE	2/1/65	100			2/1/65	70	270
69	W. D. DENNIS THEOLOG	2/1/65	500			2/1/65	70	270
70	W. J. SEANNE FARMAN	2/1/65	200			2/1/65	70	270
71	W. ROCHERRE FARMAN	2/1/65	200			2/1/65	70	270
72	W. D. JONAN F. QUIRLEY	2/1/65	200			2/1/65	70	270
73	W. HAYAN LORCHMAN	2/1/65	100			2/1/65	70	270
74	—	—	—	—	—	—	—	—
75	—	—	—	—	—	—	—	—
76	—	—	—	—	—	—	—	—
77	Estelle Jere	2/1/65	100			2/1/65	70	270
78	Marilyn Horcas	2/1/65	100			2/1/65	70	270
79	Marilyn Horcas	2/1/65	100			2/1/65	70	270
80	Arlene Hoff	2/1/65	100			2/1/65	70	270
81	Maurice L. Janks II	2/1/65	100			2/1/65	70	270
82	Mary T. Reid	2/1/65	50			2/1/65	70	270
83	Ruth B. Hernandez	2/1/65	100			2/1/65	70	270
84	Frank J. Kelly Jr.	2/1/65	200			2/1/65	70	270
85	W. Mary E. Kelly	2/1/65	100			2/1/65	70	270
86	Beverly Goldstein	2/1/65	100			2/1/65	70	270
87	Charles E. Tamborello	2/1/65	100			2/1/65	70	270
88	Patricia Del Rey	2/1/65	200			2/1/65	70	270
89	W. Virginia Massimone	2/1/65	100			2/1/65	70	270
90	W. Helen Valdes D'Aras	2/1/65	200			2/1/65	70	270

	Date	Am't	Date	Am't	Sett. Amt	Plm. Tol. Credit
91	Patricia Ahearne	1/24/65	100	2/10/65	100	270
92	Victor Schneidman	2/16/65	200	2/16/65	200	270
93	Daisy	1/24/65	200	2/10/65	200	270
94	Marcelo Difini	1/24/65	200	2/10/65	200	270
95	Don D. Pratt	1/24/65	200	2/10/65	200	270
96	Don D. DeGuer	1/24/65	400	2/10/65	400	270
97	W. Martin DeGuer	1/24/65	270	2/10/65	270	270
98	Joseph Scavone	2/16/65	200	2/16/65	200	270
99	Green D. Hill	2/16/65	200	2/16/65	200	270
100	Madec & Sweeney	2/16/65	200	2/16/65	200	270
101	John Evans	2/16/65	200	2/16/65	200	270
102	Gerardine Grosky	2/16/65	400	2/16/65	400	270
103	Marshall Gregory	2/16/65	100	2/16/65	100	270
104	Susan Sweeney	2/16/65	100	2/16/65	100	270
105	Harold Hall	2/16/65	100	2/16/65	100	270
106	James L. Mitchell	2/16/65	200	2/16/65	200	270
107	Carl Winkler Stern	2/16/65	100	2/16/65	100	270
108	John E. Kender	2/16/65	400	2/16/65	400	270
109	Mary F. Kender	2/16/65	200	2/16/65	200	270
110	Stella Evans	2/16/65	200	2/16/65	200	270
111	Geomet H. Kender	2/16/65	200	2/16/65	200	270
112	Elaine Freed	2/16/65	200	2/16/65	200	270
113	Bronnie Raver	2/16/65	200	2/16/65	200	270
114	Claire P. St. Pierre	2/16/65	200	2/16/65	200	270
115	Bob Allen Brown	2/16/65	200	2/16/65	200	270
116	Grace R. Harrison	2/16/65	200	2/16/65	200	270
117	Arthur Harrison	2/16/65	200	2/16/65	200	270
118	Barbara A. Battaglioli	2/16/65	100	2/16/65	100	270
119	Barbara Ann D. Battaglioli	2/16/65	100	2/16/65	100	270
120	Adviser Urbinicki	2/16/65	50	2/16/65	50	270

5/14/85

	Dep	C	Age	Fund	Vol.	Tail	Vinyl
101	99- Hoyer Roseman	2/16/65	200 - 2/26/65	200	4/26/65	190 -	270 - }
102	100 W Frances						270 - }
103	Lynette Muller 101	2/31	50 -	50 - 150 -	4/5/65	70 -	270 - }
104	Dorothy G. Heldman 102	2/6	200 -		4/26/65	70 -	270 - }
105	Toska Tokes	2/15	200		4/5/65	70 -	270 - }
106	Teresa Basso	2/17	270				270 - }
107	Emile Ellberger	2/4	200		4/26/65	190 -	270 - }
108	Bertha Ellberger						270 - }
109	Stella M. Ledman	2/16/65	750		4/10/65	330 -	270 - }
110	Stephan J. Ledman						270 - }
111	Lenore R. Ledman						270 - }
112	Paul J. Ledman						270 - }
113	Mary Jurkiewicz						270 - }
114	Dolores Parrizita	2/16	200				270 - }
115	Carl B. Adams III	2/13	200				270 - }
116	Peter Skinner	2/16	200				270 - }
117	(Sharon Maloney)	2/16	100				270 - }
118	(Patricia H. Taffner)	2/16	100				270 - }
119	(Ellen Ammirato)	2/16	270				270 - }
120	(Isabelle D. Pascale)	2/16	270				270 - }
121	John S. Koplas	2/16	400				270 - }
122	Dianne C. Koplas						270 - }
123	(Sharon Feingold)	2/16	100				270 - }
124	(Gael Spedding)	2/16	100				270 - }
125	Stanley Klein	2/16	100				270 - }
126	-117 June W. Johns	2/16	600				270 - }
127	Rhys Johns						270 - }
128	Rebecca Ho Entee						270 - }
129	Olga E. Winsor	2/16/65	400				270 - }
130	H. Frederic H. Winsor						270 - }

#1 Tandon Paris

[illegible]

	Pay 1	Pay 2	Pay 3	Am	per	Concl.
181	ROBERT S. HARR	2/16/65	200			200
182	S. MACH					
183	148' ARNOLD GOTTSHIED	2/15/65	10 - 2/16/65	390	4/5/65	270
184	149' W. JANKA					270
185	150' E. JEWEL HOODSTON	2/16/65	400			270
186	151' H. ROBERT					270
187	152' C. H. GUSTAFSON	2/16/65	200 - 3/29/65	200	4/29	270
188	153' H.					270
189	154' Gloria Sverdlung	2/16/65	135	3/10/65	4/5/65	270
190	155' Diana Nagelberg	2/12/65	100 - 3/29/65	170		270
191	156' Elaine Summers	2/12/65	100	3/29/65		270
192	157' Amy L. Wolfe	2/15/65	100		4/3/65	270
193	158' John McKeown	2/16/65	200		4/1	270
194	159' Anita J. Goldstein	2/16/65	103	3/29/65	170	270
195	160' R. E. C. CAMPBELL	2/25/65	100		4/5/65	270
196	161' P. H. Krieger	2/16/65	200		4/5/65	270
197	162' J. J. S. S. S.	2/16/65	200		4/5/65	270
198	163' J. J. S. S. S.	2/16/65	200		4/5/65	270
199	164' J. J. S. S. S.	2/16/65	200		4/5/65	270
200	165' J. J. S. S. S.	2/16/65	200		4/5/65	270
201	166' J. J. S. S. S.	2/16/65	200		4/5/65	270
202	167' J. J. S. S. S.	2/16/65	200		4/5/65	270
203	168' J. J. S. S. S.	2/16/65	200		4/5/65	270
204	169' J. J. S. S. S.	2/16/65	200		4/5/65	270
205	170' J. J. S. S. S.	2/16/65	200		4/5/65	270
206	171' J. J. S. S. S.	2/16/65	200		4/5/65	270
207	172' J. J. S. S. S.	2/16/65	200		4/5/65	270
208	173' J. J. S. S. S.	2/16/65	200		4/5/65	270
209	174' J. J. S. S. S.	2/16/65	200		4/5/65	270
210	175' J. J. S. S. S.	2/16/65	200		4/5/65	270
211	176' J. J. S. S. S.	2/16/65	200		4/5/65	270
212	177' J. J. S. S. S.	2/16/65	200		4/5/65	270
213	178' J. J. S. S. S.	2/16/65	200		4/5/65	270
214	179' J. J. S. S. S.	2/16/65	200		4/5/65	270
215	180' J. J. S. S. S.	2/16/65	200		4/5/65	270
216	181' J. J. S. S. S.	2/16/65	200		4/5/65	270
217	182' J. J. S. S. S.	2/16/65	200		4/5/65	270
218	183' J. J. S. S. S.	2/16/65	200		4/5/65	270
219	184' J. J. S. S. S.	2/16/65	200		4/5/65	270
220	185' J. J. S. S. S.	2/16/65	200		4/5/65	270
221	186' J. J. S. S. S.	2/16/65	200		4/5/65	270
222	187' J. J. S. S. S.	2/16/65	200		4/5/65	270
223	188' J. J. S. S. S.	2/16/65	200		4/5/65	270
224	189' J. J. S. S. S.	2/16/65	200		4/5/65	270
225	190' J. J. S. S. S.	2/16/65	200		4/5/65	270
226	191' J. J. S. S. S.	2/16/65	200		4/5/65	270
227	192' J. J. S. S. S.	2/16/65	200		4/5/65	270
228	193' J. J. S. S. S.	2/16/65	200		4/5/65	270
229	194' J. J. S. S. S.	2/16/65	200		4/5/65	270
230	195' J. J. S. S. S.	2/16/65	200		4/5/65	270

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190
2	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206
3	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222
4	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238
5	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254
6	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270
7	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286
8	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302
9	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318
10	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334
11	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350
12	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366
13	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382
14	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398
15	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414
16	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430

July 1917
A. J. Harris
Sept 300
Pres. N.Y.
\$ 250.00

#2

		Date	Amount	Date	Amount	Date	Amount	And	Conceded
1	①	Sept 200	200	200	200	200	200		
2	②								
3	③	Lucille C. Molauche	200	200	200	200	200		
4	④	Geo. Molauche	200	200	200	200	200		
5	⑤	Hymen Jacoby	200	200	200	200	200		
6	⑥	Jacoby	200	200	200	200	200		
7	⑦	Edward D. Fidler	200	200	200	200	200		
8	⑧	Anneliese Fidler	200	200	200	200	200		
9	⑨	Infant - Mrs. Hans Fidler	200	200	200	200	200		
10	⑩	Elaine Cabada	200	200	200	200	200		
11	⑪	Elsie Drescher	200	200	200	200	200		
12	⑫	Wm Chester Miller	200	200	200	200	200		
13	⑬	Wm Senja Miller	200	200	200	200	200		
14	⑭	F. John Walter	200	200	200	200	200		
15	⑮	Elsie A. Ditewig	200	200	200	200	200		
16	⑯	Marion Steiner	200	200	200	200	200		
17	⑰	Heaton Hudson	200	200	200	200	200		
18	⑱	Charles Gillet	200	200	200	200	200		
19	⑲	Robert F. Borgatta	200	200	200	200	200		
20	⑳	Isabel	200	200	200	200	200		
21	㉑	Francesca	200	200	200	200	200		
22	㉒	Paola	200	200	200	200	200		
23	㉓	Alice Mig	200	200	200	200	200		
24	㉔	Wolff J. Jaglinsky	200	200	200	200	200		
25	㉕	Seymour Nudell	200	200	200	200	200		
26	㉖	Bernice	200	200	200	200	200		
27	㉗	Leon Herian	200	200	200	200	200		
28	㉘	Dr. Lyclona T. Carroll	200	200	200	200	200		
29	㉙	W. Ray Kirby	200	200	200	200	200		
30	㉚	Clinton T. Sampson	200	200	200	200	200		

22 Paris

	Date	Am't	Date	Am't	Date	Am't	Final Conc.
30 W. Barbara Suez	9/5/65	100			1/3/65	180	280
31 W. Frank Roy, Jr.	1/29	300	2/5		3/2/65	240	280
32 W. " (same note)							280
33 W. " (same note)							280
34 W. Eileen P. Baron	1/26	50	2/5	50	3/2/65	180	280
35 W. John H. Byrnes	1/15	100			3/2/65	180	280
36 W. Ronald M. Lombard	1/16	100	3/5	100	3/2/65	180	280
37 W. Morris Baxter	1/20	100	4/5	100	4/2/65	80	280
38 W. Dennis Cass	1/18	200			4/1/65	80	280
39 W. Sylvia Dwyer	1/17	300					280
40 W. Hattie Dwyer							280
41 W. Lemo Dwyer							280
42 W. Mary J. Gansford	1/14	100	2/3	100	9/3/65	80	280
43 W. Arthur P. Gansford	1/16	200	2/1	200	1/2/65	160	280
44 W. Bruce P. Gansford							280
45 W. Madeline G. Gansford	1/30	100	2/3	100	4/5/65	80	280
46 W. Joseph Gansford	1/14	100	2/3	100	4/5/65	80	280
47 W. Leonard Gansford	1/14	400	3/31	400	9/2/65	320	280
48 W. W. Gansford							280
49 W. David							280
50 W. Richard							280
51 W. Pasquale Torio	2/4	100	2/4	100	4/5/65	80	280
52 W. David N. Davidson	2/4	200			4/5/65	80	280
53 W. Stephen W. Davidson	2/4	200	3/5	200	3/2/65	80	280
54 W. Elmer Dwyer (Gansford)	2/4	200	3/5	200	3/2/65	80	280
55 W. Mary J. Doty	2/4	200	3/5	200	3/2/65	80	280
56 W. Sharon F. Dwyer							280
57 W. Oliver C. Davis	2/4	100			4/2	80	280
58 W. Eugene F. Davis							280
59 W. Gloria Harvey Davis							280
60 W. Betty Stirling Barno	2/1	100	2/3/65	100	4/1	80	280

[illegible]

#3 - Rome - Paris

\$310

	Doc	Pay 1	Pay 2	Date and	Pay 3	Mon	Carroll
1	12 S. d Neschus	11/14/65	200	11/14/65	200	11/14/65	310
2	13 W. Renee	11/14/65	200	11/14/65	200	11/14/65	310
3	42 Joseph Fontaine	11/14/65	50	11/14/65	110	11/14/65	310
4	Andree Fontaine	11/14/65	200	11/14/65	200	11/14/65	310
5	W Rosemary Fontaine	11/14/65	50	11/14/65	110	11/14/65	310
6	14 Carmelo Ann Lafrano	11/14/65	50	11/14/65	550	11/14/65	310
7	17 H Anthony G						310
8	16 S John L. Lafrano						310
9	Mr S Leonard A.						310
10	16 D Christine A.						310
11	19 Mary L. Garguilo	11/14/65	100	11/14/65	110	11/14/65	310
12	20 Stuyvesant Van Iken	11/14/65	200	11/14/65	220	11/14/65	310
13	21 W. Felicia Van Iken	11/14/65					310
14	22 S. (Mrs) Robert Klau	11/14/65	100	11/14/65	210	11/14/65	310
15	23 Philip Reisman	11/14/65	200	11/14/65	220	11/14/65	310
16	24 Louise K. Reisman	11/14/65					310
17	25 Hosh Genser	11/14/65	100	11/14/65	110	11/14/65	310
18	26 Espiridion Peter Apple	11/14/65	100	11/14/65	110	11/14/65	310
19	27 Walter R. Hannin	11/14/65	100	11/14/65	110	11/14/65	310
20	28 Jack Hoshhauser	11/14/65	100	11/14/65	110	11/14/65	310
21	29 Louis W. Hanne	11/14/65	200	11/14/65	220	11/14/65	310
22	30 Susan Jane Hanne	11/14/65					310
23	193 Frank J. Miller	11/14/65	100	11/14/65	110	11/14/65	310
24	41 Robert M. Zinoman	11/14/65	50	11/14/65	110	11/14/65	310
25	46 Meyer D. Waks	11/14/65	200	11/14/65	420	11/14/65	310
26	47 W. Beatrice D. Waks						310
27	Selma D. Stoller						310
28	H David Stoller						310
29	Jedwig F. Wozniak						310
30	Gordon Waks						310

#3 Boye-Pais

	date	pay?	date	date	date
1	101 Abraham Zang. enow	2/19/65	500	4/13/65	2500
2	1016 Frances " 102	—	—	—	—
3	1017 Maurine " 103	—	—	—	—
4	1018 " 104	—	—	—	—
5	1019 " 105	—	—	—	—
6	1020 John F. Conner	1/17/65	100	7/16/65	110
7	1021 Brother Albin Rigamati	2/16/65	219	—	310
8	1022 Laura Festinger	500	300	4/13/65	285
9	1023 H. Martin Festinger	—	—	—	285
10	1024 " "	—	—	—	285
11	1025 " "	—	—	—	285
12	1026 Arthur Zwickel	11/16/65	100	—	—
13	1027 William " "	—	—	—	—
14	1028 Steven B. " "	—	—	—	—
15	1029 Susan J. " "	—	—	—	—
16	1030 Abraham Zang. enow	11/16/65	300	2/17/65	310
17	1031 Irene Geller	—	—	—	310
18	1032 E. Louis Geller	—	—	—	310
19	1033 M. Gertrude Geller	—	—	—	—
20	1034 Esther D. Snyder	11/25/65	100	4/14/65	110
21	1035 " " " " " "	2/16/65	100	4/13/65	310
22	1036 Jacob Gerstein	2/16/65	500	—	500
23	1037 " " " " " "	—	—	—	—
24	1038 " " " " " "	—	—	—	—
25	1039 " " " " " "	—	—	—	—
26	1040 " " " " " "	—	—	—	—
27	1041 " " " " " "	—	—	—	—
28	1042 " " " " " "	—	—	—	—
29	1043 " " " " " "	—	—	—	—
30	1044 " " " " " "	—	—	—	—
31	1045 " " " " " "	—	—	—	—
32	1046 " " " " " "	—	—	—	—
33	1047 " " " " " "	—	—	—	—
34	1048 " " " " " "	—	—	—	—
35	1049 " " " " " "	—	—	—	—
36	1050 " " " " " "	—	—	—	—
37	1051 " " " " " "	—	—	—	—
38	1052 " " " " " "	—	—	—	—
39	1053 " " " " " "	—	—	—	—
40	1054 " " " " " "	—	—	—	—
41	1055 " " " " " "	—	—	—	—
42	1056 " " " " " "	—	—	—	—
43	1057 " " " " " "	—	—	—	—
44	1058 " " " " " "	—	—	—	—
45	1059 " " " " " "	—	—	—	—
46	1060 " " " " " "	—	—	—	—
47	1061 " " " " " "	—	—	—	—
48	1062 " " " " " "	—	—	—	—
49	1063 " " " " " "	—	—	—	—
50	1064 " " " " " "	—	—	—	—
51	1065 " " " " " "	—	—	—	—
52	1066 " " " " " "	—	—	—	—
53	1067 " " " " " "	—	—	—	—
54	1068 " " " " " "	—	—	—	—
55	1069 " " " " " "	—	—	—	—
56	1070 " " " " " "	—	—	—	—
57	1071 " " " " " "	—	—	—	—
58	1072 " " " " " "	—	—	—	—
59	1073 " " " " " "	—	—	—	—
60	1074 " " " " " "	—	—	—	—
61	1075 " " " " " "	—	—	—	—
62	1076 " " " " " "	—	—	—	—
63	1077 " " " " " "	—	—	—	—
64	1078 " " " " " "	—	—	—	—
65	1079 " " " " " "	—	—	—	—
66	1080 " " " " " "	—	—	—	—
67	1081 " " " " " "	—	—	—	—
68	1082 " " " " " "	—	—	—	—
69	1083 " " " " " "	—	—	—	—
70	1084 " " " " " "	—	—	—	—
71	1085 " " " " " "	—	—	—	—
72	1086 " " " " " "	—	—	—	—
73	1087 " " " " " "	—	—	—	—
74	1088 " " " " " "	—	—	—	—
75	1089 " " " " " "	—	—	—	—
76	1090 " " " " " "	—	—	—	—
77	1091 " " " " " "	—	—	—	—
78	1092 " " " " " "	—	—	—	—
79	1093 " " " " " "	—	—	—	—
80	1094 " " " " " "	—	—	—	—
81	1095 " " " " " "	—	—	—	—
82	1096 " " " " " "	—	—	—	—
83	1097 " " " " " "	—	—	—	—
84	1098 " " " " " "	—	—	—	—
85	1099 " " " " " "	—	—	—	—
86	1100 " " " " " "	—	—	—	—
87	1101 " " " " " "	—	—	—	—
88	1102 " " " " " "	—	—	—	—
89	1103 " " " " " "	—	—	—	—
90	1104 " " " " " "	—	—	—	—
91	1105 " " " " " "	—	—	—	—
92	1106 " " " " " "	—	—	—	—
93	1107 " " " " " "	—	—	—	—
94	1108 " " " " " "	—	—	—	—
95	1109 " " " " " "	—	—	—	—
96	1110 " " " " " "	—	—	—	—
97	1111 " " " " " "	—	—	—	—
98	1112 " " " " " "	—	—	—	—
99	1113 " " " " " "	—	—	—	—
100	1114 " " " " " "	—	—	—	—
101	1115 " " " " " "	—	—	—	—
102	1116 " " " " " "	—	—	—	—
103	1117 " " " " " "	—	—	—	—
104	1118 " " " " " "	—	—	—	—
105	1119 " " " " " "	—	—	—	—
106	1120 " " " " " "	—	—	—	—
107	1121 " " " " " "	—	—	—	—
108	1122 " " " " " "	—	—	—	—
109	1123 " " " " " "	—	—	—	—
110	1124 " " " " " "	—	—	—	—
111	1125 " " " " " "	—	—	—	—
112	1126 " " " " " "	—	—	—	—
113	1127 " " " " " "	—	—	—	—
114	1128 " " " " " "	—	—	—	—
115	1129 " " " " " "	—	—	—	—
116	1130 " " " " " "	—	—	—	—
117	1131 " " " " " "	—	—	—	—
118	1132 " " " " " "	—	—	—	—
119	1133 " " " " " "	—	—	—	—
120	1134 " " " " " "	—	—	—	—
121	1135 " " " " " "	—	—	—	—
122	1136 " " " " " "	—	—	—	—
123	1137 " " " " " "	—	—	—	—
124	1138 " " " " " "	—	—	—	—
125	1139 " " " " " "	—	—	—	—
126	1140 " " " " " "	—	—	—	—
127	1141 " " " " " "	—	—	—	—
128	1142 " " " " " "	—	—	—	—
129	1143 " " " " " "	—	—	—	—
130	1144 " " " " " "	—	—	—	—
131	1145 " " " " " "	—	—	—	—
132	1146 " " " " " "	—	—	—	—
133	1147 " " " " " "	—	—	—	—
134	1148 " " " " " "	—	—	—	—
135	1149 " " " " " "	—	—	—	—
136	1150 " " " " " "	—	—	—	—
137	1151 " " " " " "	—	—	—	—
138	1152 " " " " " "	—	—	—	—
139	1153 " " " " " "	—	—	—	—
140	1154 " " " " " "	—	—	—	—
141	1155 " " " " " "	—	—	—	—
142	1156 " " " " " "	—	—	—	—
143	1157 " " " " " "	—	—	—	—
144	1158 " " " " " "	—	—	—	—
145	1159 " " " " " "	—	—	—	—
146	1160 " " " " " "	—	—	—	—
147	1161 " " " " " "	—	—	—	—
148	1162 " " " " " "	—	—	—	—
149	1163 " " " " " "	—	—	—	—
150	1164 " " " " " "	—	—	—	—
151	1165 " " " " " "	—	—	—	—
152	1166 " " " " " "	—	—	—	—
153	1167 " " " " " "	—	—	—	—
154	1168 " " " " " "	—	—	—	—
155	1169 " " " " " "	—	—	—	—
156	1170 " " " " " "	—	—	—	—
157	1171 " " " " " "	—	—	—	—
158	1172 " " " " " "	—	—	—	—
159	1173 " " " " " "	—	—	—	—
160	1174 " " " " " "	—	—	—	—
161	1175 " " " " " "	—	—	—	—
162	1176 " " " " " "	—	—	—	—
163	1177 " " " " " "	—	—	—	—
164	1178 " " " " " "	—	—	—	—
165	1179 " " " " " "	—	—	—	—
166	1180 " " " " " "	—	—	—	—
167	1181 " " " " " "	—	—	—	—
168	1182 " " " " " "	—	—	—	—
169	1183 " " " " " "	—	—	—	—
170	1184 " " " " " "	—	—	—	—
171	1185 " " " " " "	—	—	—	—
172	1186 " " " " " "	—	—	—	—
173	1187 " " " " " "	—	—	—	—
174	1188 " " " " " "	—	—	—	—
175	1189 " " " " " "	—	—	—	—
176	1190 " " " " " "	—	—	—	—
177	1191 " " " " " "	—	—	—	—
178	1192 " " " " " "	—	—	—	—
179	1193 " " " " " "	—	—	—	—
180	1194 " " " " " "	—	—	—	—
181	1195 " " " " " "	—	—	—	—
182	1196 " " " " " "	—	—	—	—
183	1197 " " " " " "	—	—	—	—
184	1198 " " " " " "	—	—	—	—
185	1199 " " " " " "	—	—	—	—
186	1200 " " " " " "	—	—	—	—
187	1201 " " " " " "	—	—	—	—
188	1202 " " " " " "	—	—	—	—
189	1203 " " " " " "	—	—	—	—
190	1204 " " " " " "	—	—	—	—
191	1205 " " " " " "	—	—	—	—
192	1206 " " " " " "	—	—	—	—
193	1207 " " " " " "	—	—	—	—
194	1208 " " " " " "	—	—	—	—
195	1209 " " " " " "	—	—	—	—
196	1210 " " " " " "	—	—	—	—
197	1211 " " " " " "	—	—	—	—
198	1212 " " " " " "	—	—	—	—
199	1213 " " " " " "	—	—	—	—
200	1214 " " " " " "	—	—	—	—
201	1215 " " " " " "	—	—	—	—
202	1216 " " " " " "	—	—	—	—
203	1217 " " " " " "	—	—	—	—
204	1218 " " " " " "	—	—	—	—
205	1219 " " " " " "	—	—	—	—
206	1220 " " " " " "	—	—	—	—
207	1221 " " " " " "	—	—	—	—
208	1222 " " " " " "	—	—	—	—
209	1223 " " " " " "	—	—		

Tr. 452

- 456 -

[Tr. 452]

EXHIBIT BOE 44

#3 Ram.

1	Harold Green 133 250	(Green 133 250)	310
2	Margot Morin 178 400		310
3	Michael Morin 179		310
4			

#6. 114 Paris Paris N.Y. 7/14-9/15/61

	Pay 1	Pay 2	Pay 3	Plaid/Cash
1 O Mario Simon	30	30/65	240	280
2 F Dr. Karl Simon				280
3 H Elizabeth Simon				280
4 J Jane C. Joslyn	1200	30/65	300	280
5 D Joslyn	1200			280
6 D Joslyn	1200	30/65	240	280
7 D Joslyn	1200	30/65	240	280
8 D Joslyn	1200	30/65	240	280
9 D Joslyn	1200	30/65	240	280
10 D Joslyn	1200	30/65	240	280
11 D Joslyn	1200	30/65	240	280
12 D Joslyn	1200	30/65	240	280
13 D Joslyn	1200	30/65	240	280
14 D Joslyn	1200	30/65	240	280
15 D Joslyn	1200	30/65	240	280
16 D Joslyn	1200	30/65	240	280
17 D Joslyn	1200	30/65	240	280
18 D Joslyn	1200	30/65	240	280
19 D Joslyn	1200	30/65	240	280
20 D Joslyn	1200	30/65	240	280
21 D Joslyn	1200	30/65	240	280
22 D Joslyn	1200	30/65	240	280
23 D Joslyn	1200	30/65	240	280
24 D Joslyn	1200	30/65	240	280
25 D Joslyn	1200	30/65	240	280
26 D Joslyn	1200	30/65	240	280
27 D Joslyn	1200	30/65	240	280
28 D Joslyn	1200	30/65	240	280
29 D Joslyn	1200	30/65	240	280
30 D Joslyn	1200	30/65	240	280

[Tr. 454]

	Pay 1	Pay 2	Pay 3	Pay 4	Pay 5
1 - ROBERT S. HODGE	3/1/65	200	4/27/65	160	280
2 - IR. PHILIP SEIDEN	3/1/65	200	4/27/65	160	280
3 - ED. BERNARD FINE	3/1/65	200	4/27/65	160	280
4 - FREDERICK SUNDHOLM	3/1/65	100	Carve	3.25 ct. #1	100
5 - Ed. Susan J. Glosier	3/1/65	200	4/27/65	160	280
6 - Ed. EUGENE KUTNER	3/1/65	150	4/12/65	70	280
7 - Ed. LUCY MARIE NEWMAN	3/1/65	100	5/3/65	180	280
8 - Ed. LOUIS BUTTERSTEIN	3/1/65	100	5/3/65	180	280
9 - Ed. EDWARD HARMON	3/1/65	500	4/19/65	500	280
10 - Ed. " "	3/1/65	500	4/19/65	500	280
11 - Ed. " "	3/1/65	500	4/19/65	500	280
12 - Ed. " "	3/1/65	500	4/19/65	500	280
13 - Ed. " "	3/1/65	500	4/19/65	500	280
14 - Ed. " "	3/1/65	500	4/19/65	500	280
15 - Ed. " "	3/1/65	500	4/19/65	500	280
16 - Ed. " "	3/1/65	500	4/19/65	500	280
17 - Ed. " "	3/1/65	500	4/19/65	500	280
18 - Ed. " "	3/1/65	500	4/19/65	500	280
19 - Ed. " "	3/1/65	500	4/19/65	500	280
20 - Ed. " "	3/1/65	500	4/19/65	500	280
21 - Ed. " "	3/1/65	500	4/19/65	500	280
22 - Ed. " "	3/1/65	500	4/19/65	500	280
23 - Ed. " "	3/1/65	500	4/19/65	500	280
24 - Ed. " "	3/1/65	500	4/19/65	500	280
25 - Ed. " "	3/1/65	500	4/19/65	500	280
26 - Ed. " "	3/1/65	500	4/19/65	500	280
27 - Ed. " "	3/1/65	500	4/19/65	500	280
28 - Ed. " "	3/1/65	500	4/19/65	500	280
29 - Ed. " "	3/1/65	500	4/19/65	500	280
30 - Ed. " "	3/1/65	500	4/19/65	500	280
31 - Ed. " "	3/1/65	500	4/19/65	500	280
32 - Ed. " "	3/1/65	500	4/19/65	500	280
33 - Ed. " "	3/1/65	500	4/19/65	500	280
34 - Ed. " "	3/1/65	500	4/19/65	500	280
35 - Ed. " "	3/1/65	500	4/19/65	500	280
36 - Ed. " "	3/1/65	500	4/19/65	500	280
37 - Ed. " "	3/1/65	500	4/19/65	500	280
38 - Ed. " "	3/1/65	500	4/19/65	500	280
39 - Ed. " "	3/1/65	500	4/19/65	500	280
40 - Ed. " "	3/1/65	500	4/19/65	500	280
41 - Ed. " "	3/1/65	500	4/19/65	500	280
42 - Ed. " "	3/1/65	500	4/19/65	500	280
43 - Ed. " "	3/1/65	500	4/19/65	500	280
44 - Ed. " "	3/1/65	500	4/19/65	500	280
45 - Ed. " "	3/1/65	500	4/19/65	500	280
46 - Ed. " "	3/1/65	500	4/19/65	500	280
47 - Ed. " "	3/1/65	500	4/19/65	500	280
48 - Ed. " "	3/1/65	500	4/19/65	500	280
49 - Ed. " "	3/1/65	500	4/19/65	500	280
50 - Ed. " "	3/1/65	500	4/19/65	500	280
51 - Ed. " "	3/1/65	500	4/19/65	500	280
52 - Ed. " "	3/1/65	500	4/19/65	500	280
53 - Ed. " "	3/1/65	500	4/19/65	500	280
54 - Ed. " "	3/1/65	500	4/19/65	500	280
55 - Ed. " "	3/1/65	500	4/19/65	500	280
56 - Ed. " "	3/1/65	500	4/19/65	500	280
57 - Ed. " "	3/1/65	500	4/19/65	500	280
58 - Ed. " "	3/1/65	500	4/19/65	500	280
59 - Ed. " "	3/1/65	500	4/19/65	500	280
60 - Ed. " "	3/1/65	500	4/19/65	500	280
61 - Ed. " "	3/1/65	500	4/19/65	500	280
62 - Ed. " "	3/1/65	500	4/19/65	500	280
63 - Ed. " "	3/1/65	500	4/19/65	500	280
64 - Ed. " "	3/1/65	500	4/19/65	500	280
65 - Ed. " "	3/1/65	500	4/19/65	500	280
66 - Ed. " "	3/1/65	500	4/19/65	500	280
67 - Ed. " "	3/1/65	500	4/19/65	500	280
68 - Ed. " "	3/1/65	500	4/19/65	500	280
69 - Ed. " "	3/1/65	500	4/19/65	500	280
70 - Ed. " "	3/1/65	500	4/19/65	500	280
71 - Ed. " "	3/1/65	500	4/19/65	500	280
72 - Ed. " "	3/1/65	500	4/19/65	500	280
73 - Ed. " "	3/1/65	500	4/19/65	500	280
74 - Ed. " "	3/1/65	500	4/19/65	500	280
75 - Ed. " "	3/1/65	500	4/19/65	500	280
76 - Ed. " "	3/1/65	500	4/19/65	500	280
77 - Ed. " "	3/1/65	500	4/19/65	500	280
78 - Ed. " "	3/1/65	500	4/19/65	500	280
79 - Ed. " "	3/1/65	500	4/19/65	500	280
80 - Ed. " "	3/1/65	500	4/19/65	500	280
81 - Ed. " "	3/1/65	500	4/19/65	500	280
82 - Ed. " "	3/1/65	500	4/19/65	500	280
83 - Ed. " "	3/1/65	500	4/19/65	500	280
84 - Ed. " "	3/1/65	500	4/19/65	500	280
85 - Ed. " "	3/1/65	500	4/19/65	500	280
86 - Ed. " "	3/1/65	500	4/19/65	500	280
87 - Ed. " "	3/1/65	500	4/19/65	500	280
88 - Ed. " "	3/1/65	500	4/19/65	500	280
89 - Ed. " "	3/1/65	500	4/19/65	500	280
90 - Ed. " "	3/1/65	500	4/19/65	500	280
91 - Ed. " "	3/1/65	500	4/19/65	500	280
92 - Ed. " "	3/1/65	500	4/19/65	500	280
93 - Ed. " "	3/1/65	500	4/19/65	500	280
94 - Ed. " "	3/1/65	500	4/19/65	500	280
95 - Ed. " "	3/1/65	500	4/19/65	500	280
96 - Ed. " "	3/1/65	500	4/19/65	500	280
97 - Ed. " "	3/1/65	500	4/19/65	500	280
98 - Ed. " "	3/1/65	500	4/19/65	500	280
99 - Ed. " "	3/1/65	500	4/19/65	500	280
100 - Ed. " "	3/1/65	500	4/19/65	500	280

	Pay 1	Pay 2	Pay 3	Pay 4
1	9/1/65 120		9/1/65 120	200
2	9/1/65 120		9/1/65 120	200
3	9/1/65 120		9/1/65 120	200
4	9/1/65 120		9/1/65 120	200
5	9/1/65 120		9/1/65 120	200
6	9/1/65 120		9/1/65 120	200
7	9/1/65 120		9/1/65 120	200
8	9/1/65 120		9/1/65 120	200
9	9/1/65 120		9/1/65 120	200
10	9/1/65 120		9/1/65 120	200
11	9/1/65 120		9/1/65 120	200
12	9/1/65 120		9/1/65 120	200
13	9/1/65 120		9/1/65 120	200
14	9/1/65 120		9/1/65 120	200
15	9/1/65 120		9/1/65 120	200
16	9/1/65 120		9/1/65 120	200
17	9/1/65 120		9/1/65 120	200
18	9/1/65 120		9/1/65 120	200
19	9/1/65 120		9/1/65 120	200
20	9/1/65 120		9/1/65 120	200
21	9/1/65 120		9/1/65 120	200
22	9/1/65 120		9/1/65 120	200
23	9/1/65 120		9/1/65 120	200
24	9/1/65 120		9/1/65 120	200
25	9/1/65 120		9/1/65 120	200
26	9/1/65 120		9/1/65 120	200
27	9/1/65 120		9/1/65 120	200
28	9/1/65 120		9/1/65 120	200
29	9/1/65 120		9/1/65 120	200
30	9/1/65 120		9/1/65 120	200

7/4-9/5/65 #6 - Paris - Paris

	Pay	Pay	Pay	idmful Connell
1-125	Jean C. St. Pierre	3/26/65 100	3/25/65 180	280
2	Barbara Banks	3/26/65 100	4/3/65 180	280
3-126	Linda Kamins	3/26/65 100	4/3/65 180	280
4-127	Eileen Gagsman	3/26/65 100	4/3/65 180	280
5-128	Erla Linden	3/26/65 200	4/3/65 180	280
6	Barrie R. Feuzer	3/26/65 200	4/3/65 180	280
7	M. Furman H.	3/26/65 200	4/3/65 180	280
8-129	Inga Jonsson	3/26/65 200	4/3/65 180	280
9-130	Eleanor J. Pontes	3/26/65 200	4/3/65 180	280
10-131	Joanne Robinson	3/26/65 200	4/3/65 180	280
11	Inga Jonsson	3/26/65 200	4/3/65 180	280
12-132	Alfred H. Lutwat	3/26/65 500	4/3/65 180	280
13-133	Sylvia F.	3/26/65 500	4/3/65 180	280
14-134	Lawrence B.	3/26/65 500	4/3/65 180	280
15-135	Steven J.	3/26/65 500	4/3/65 180	280
16	David Weintraub	3/26/65 500	4/3/65 180	280
17-136	Sylvia B. Fried	3/26/65 100	4/3/65 180	280
18-137	Philip Seidenberg	3/26/65 100	4/3/65 180	280
19	Perceval Macdonald	3/26/65 200	4/3/65 180	280
20	David J.	3/26/65 200	4/3/65 180	280
21-138	William Parace	3/26/65 100	4/3/65 180	280
22-139	Linda Garsman	3/26/65 200	4/3/65 180	280
23-140	Leah Markin	3/26/65 100	4/3/65 180	280
24-141	Heure Bernard	3/26/65 100	4/3/65 180	280
25-142	James G. Shea	3/26/65 100	4/3/65 180	280
26-143	John M. Kink	3/26/65 100	4/3/65 180	280
27-144	Bernice Bloom	3/26/65 100	4/3/65 180	280
28-145	Phyllis Dolgin	3/26/65 100	4/3/65 180	280
29-146	Peter B. Morris	3/26/65 200	4/3/65 180	280
30-147	Selma R. Morris	3/26/65 200	4/3/65 180	280

44-6 Paris 7/4-9/5/65

	Pay 1	Pay 2	Pay 3	Ed in full	Cen.
1	43/6	41/6	350	560	1
2					2
3					3
4					4
5					5
6					6
7					7
8					8

176 Rosalie Kaplan
 1 Mike Kaplan 176
 176 Linda Gargues
 10 Westwood Chester Miller
 11 W. Sanje Miller
 176 ~~Franklin~~
 176 ~~Franklin~~

(from 7-7 in full. 24 on 7-7 and 300)

	Pay 1	Pay 2	Pay 3	Pay 4
1	W. S. F. FIEDER	200	200	200
2	W. S. F. FIEDER	100	210	210
3	M. S. F. FIEDER	200	110	310
4	W. S. F. FIEDER	200	110	310
5	W. S. F. FIEDER	200	110	310
6	W. S. F. FIEDER	200	110	310
7	W. S. F. FIEDER	200	110	310
8	W. S. F. FIEDER	200	110	310
9	W. S. F. FIEDER	200	110	310
10	W. S. F. FIEDER	200	110	310
11	W. S. F. FIEDER	200	110	310
12	W. S. F. FIEDER	200	110	310
13	W. S. F. FIEDER	200	110	310
14	W. S. F. FIEDER	200	110	310
15	W. S. F. FIEDER	200	110	310
16	W. S. F. FIEDER	200	110	310
17	W. S. F. FIEDER	200	110	310
18	W. S. F. FIEDER	200	110	310
19	W. S. F. FIEDER	200	110	310
20	W. S. F. FIEDER	200	110	310
21	W. S. F. FIEDER	200	110	310
22	W. S. F. FIEDER	200	110	310
23	W. S. F. FIEDER	200	110	310
24	W. S. F. FIEDER	200	110	310
25	W. S. F. FIEDER	200	110	310
26	W. S. F. FIEDER	200	110	310
27	W. S. F. FIEDER	200	110	310
28	W. S. F. FIEDER	200	110	310
29	W. S. F. FIEDER	200	110	310
30	W. S. F. FIEDER	200	110	310

#7 Rome Paris 74-9/5/5

	Pay 1	Pay 2	Pay 3	Pay Total
1-95 (continued)				
1-95 F. JENSEN P. GUARDARO				310 -
2-96 H. ELVIDA GUARDARO				310 -
3-97 G. ROSE F. ROSE	200	200	200	600 -
4-98 H. F. ROSE	200	200	200	600 -
5-99 R. ROSE	200	200	200	600 -
6-100 H. ROSE	200	200	200	600 -
7-101 L. ROSE	200	200	200	600 -
8-102 S. ROSE	200	200	200	600 -
9-103 L. ROSE	200	200	200	600 -
10-104 M. ROSE	200	200	200	600 -
11-105 F. ROSE	200	200	200	600 -
12-106 E. ROSE	200	200	200	600 -
13-107 A. ROSE	200	200	200	600 -
14-108 C. ROSE	200	200	200	600 -
15-109 P. ROSE	200	200	200	600 -
16-110 M. ROSE	200	200	200	600 -
17-111 F. ROSE	200	200	200	600 -
18-112 F. ROSE	200	200	200	600 -
19-113 M. ROSE	200	200	200	600 -
20-114 L. ROSE	200	200	200	600 -
21-115 A. ROSE	200	200	200	600 -
22-116 P. ROSE	200	200	200	600 -
23-117 S. ROSE	200	200	200	600 -
24-118 M. ROSE	200	200	200	600 -
25-119 F. ROSE	200	200	200	600 -
26-120 L. ROSE	200	200	200	600 -
27-121 A. ROSE	200	200	200	600 -
28-122 P. ROSE	200	200	200	600 -
29-123 S. ROSE	200	200	200	600 -
30-124 M. ROSE	200	200	200	600 -

#7 Name - Date 7/4 - 9/5

	Pay	Pay 2	Pay 3	in
1	173 E. Halmers K. Stuart 6/26/5	310	—	310
2	174 E. Halmers K. Gargula 4/19/5	50	—	310
3	175 E. Halmers K. Fern 4/16/5	60	—	310
4	176 E. Halmers K. Fern 4/16/5	60	—	310
5	177 E. Halmers K. Fern 4/16/5	60	—	310
6	178 E. Halmers K. Fern 4/16/5	60	—	310
7	179 E. Halmers K. Fern 4/16/5	60	—	310
8	180 E. Halmers K. Fern 4/16/5	60	—	310
9	181 E. Halmers K. Fern 4/16/5	60	—	310
10	182 E. Halmers K. Fern 4/16/5	60	—	310

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

DATE	AMOUNT
11/16/64	
for	
20.00	20 -
20.00	100 -
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	120 -

PAY TO THE ORDER OF Relax Travel Service 120.00

One Hundred Twenty and 00/100 DOLLARS

THE NEW YORK STATE TRAVELERS STUDY GROUP

MANUFACTURERS HANOVER TRUST COMPANY
2100 WHITE PLAINS ROAD, BRONX, N. Y.

Sari Friedman Treas.

③

⑆0000012000⑈

⑆0000012000⑈

- 467 -
[Tr. 463]

RELAX TRAVEL SERVICE
211 CENTRE AVE.
NEW ROCHELLE
NY 10841 NE 6-3773

NOV 10 1964
F.R.B. NEW YORK
TR. CO. P.E.G.
CITY OF NEW YORK

NOV 10 1964
F.R.B. NEW YORK
TR. CO. P.E.G.
CITY OF NEW YORK

NOV 10 1964
F.R.B. NEW YORK
TR. CO. P.E.G.
CITY OF NEW YORK

Tr. 463
EXHIBIT BOE 55

no. 584

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
11/9/64	
for payment of Stationery bill of Gladwin Associates 10/1	
cash, letter etc, miscellaneous	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	82 71

PAY TO THE ORDER OF Traveler Travel Service 82 71

Eighty-two and 71/100 DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

Lois Friedman, Treasurer

MANUFACTURERS HANOVER TRUST COMPANY
2166 WHITE PLAINS ROAD, BRONX, N. Y.

⑆0210⑉0030⑉0056 0⑉29013⑆

⑈00000008271⑈

Tr. 464

- 468 -

[Tr. 464]

NEISON TRAVEL SERVICE
181 CENTRE AVE.
NEW ROCHELLE
914 NE 6-6776

NOV 10 64
F.R.B. NEW YORK
TR. CO. F.E.G.
PAY TO THE ORDER OF
1-120 30 1-120

EXHIBIT BOE 56

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

DATE	AMOUNT
DEPOSIT	1196.04
WOBAS	177.00
FRONT BRANCH	4.00
SINAPS (04)	NY 65
TOTAL OF INVOICES	1690.72
LESS	
AMOUNT OF CHECK	1690.72

PAY TO THE
ORDER OF

MANUFACTURERS HANOVER
TRUST COMPANY
8100 WHITE PLAINS ROAD, BRONX, N. Y.

⑆0210⑉0030⑆0056 0⑉29013⑆ 2212⑆0000169072⑆

NO. 592

12/7

12

1690.72

ONE THOUSAND SIX HUNDRED NINETY AND 72/100 DOLLARS
THE NEW YORK STATE TRUNKING STUDY GROUP

Levi Friedman, Treas.

For Deposit
Nelson Travel Service
check # 113-88V



[Tr. 467]

- 471 -

EXHIBIT BOE 59

Tr. 467.

[Tr. 470]

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING		NO. 595	
DATE	AMOUNT		
12/12/64			
Travel			
Agency			
pay			
vacation			
for (E. L. G. H. H.)			
TOTAL OF INVOICES			
LESS			
AMOUNT OF CHECK	1000		

PAID Dec. 17, 1964

PAY TO THE ORDER OF Travel Service 1000.00

One thousand and 00/100 DOLLARS

MANUFACTURERS HANOVER TRUST COMPANY
8188 WHITE PLAINS ROAD, BRONX, N. Y.

THE NEW YORK STATE TEACHERS STUDY GROUP
Sam Friedman, Treasurer

⑆0210⑉0030⑆0056 0⑉29013⑆ ⑈00001000007

FOR DEPOSIT
NORSON TRAVEL
#13-8855

DEC 18 1964

30141

1-120
FAY PAYEE'S BANK
NEW YORK
FNB NEW YORK
1-120

DEC 21 64

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

DATE	AMOUNT
12/21/61	
Administration	
Expenses	
Purchase	107 -
Books	80 -
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	



PAY TO THE ORDER OF Friedman Travel Service
One hundred eighty seven and 00/100

MANUFACTURERS HANOVER
 TRUST COMPANY
 8188 WHITE PLAINS ROAD, BRONX, N. Y.

Dec. 21, 1961

no. 396

187.00

DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Treas.

⑆0210⑉0030⑈0056 0⑉29013⑈

⑈0000018700⑈

[Tr. 471]

- 475 -

FOR DEPOSIT
 NELSON TRAVEL SERVICE
 #113-8855

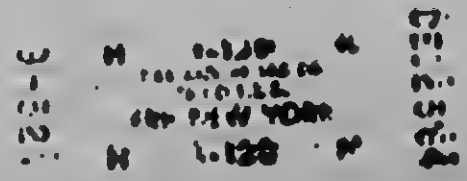
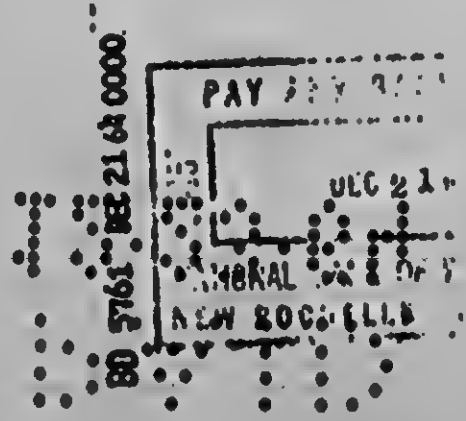


EXHIBIT BOE 63

Tr. 471

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING		NO. 598	
DATE	AMOUNT		
12/21/64			
Balance of deposit			
W. E. Kane			
Hotel			
(Acropolis, N.Y.)			
12/19/64 East			
package			
TOTAL OF INVOICES			
LESS			
AMOUNT OF CHECK	660		

PAY TO THE ORDER OF Richard Travel Service 660.00

Six hundred sixty and 00/100 DOLLARS

THE NEW YORK STATE TRAVELERS' GROUP

MANUFACTURERS HANOVER TRUST COMPANY
818 WHITE PLAINS ROAD, BRONX, N. Y.

Sari Friedman

⑆10210⑉0030⑆0056 0⑉29013⑆ ⑆0000090000⑆

[Tr. 472]

- 476 -

For Deposit
Nelson Travel Service
#113-8855

80 5760 DE 21 64 0000

PAY ANY BANK

NATIONAL BANK OF NEW YORK

3-121

DEPOSIT

EXHIBIT BOE 64

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
12/30/64	
repayment	
of deposit	
to British	
Empire	
drawings	
(closed July 19)	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	



PAY TO THE ORDER OF Travel Service
Twenty thousand seven hundred seventy-three and 00/100 DOLLARS
MANUFACTURERS HANOVER TRUST COMPANY
 2100 WHITE PLAINS ROAD, BRONX, N. Y.

Dec 28 1964

NO. 599

1-30
110

2773.00

THE NEW YORK STATE TRADING STUDY GROUP

Sari Friedman, Treas.

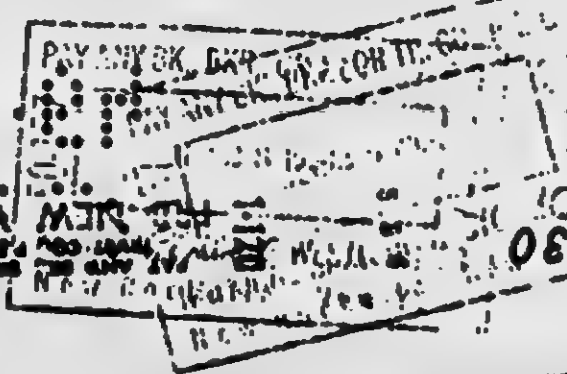
⑆0210⑉0030⑆0056 0⑉29013⑆

⑆0000277300⑆

For Deposit
 NELSON TRAVEL SERVICE
 #113-8845

NEW YORK 1230 PM DEC 30 1964

75.00



NEW YORK 1-30 PM DEC 30 1964

[Tr. 473]

EXHIBIT BOE 65

- 477 -

Tr. 473

For Deposit

NELSON TRAVEL SERVICE
81 CENTRE AVE.
NEW ROCHELLE
NEW YORK 6-6776

#113-8AN

JAN 11 1965
FEB NEW YORK

1-120

1-120

1-120

1-120

1-120

1-120

1-120

1-120

1-120

1-120

1-120

1-120

EXHIBIT BOE 69

Tr. 477

- 481 -

[Tr. 477]

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
1/4/65	
for part	
payment	
to Capitol	
airline	
charter	
N.Y. Paris	
Rome	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	

PAID

NO 607

Jan 4 1965

PAY TO THE ORDER OF Nelson Travel Service \$933.00

Nine hundred thirty-three and 00/100 DOLLARS

MANUFACTURERS HANOVER TRUST COMPANY
2188 WHITE PLAINS ROAD, BRONX, N. Y.

THE NEW YORK STATE TRAVELERS STUDY GROUP

Sari Friedman, Treasurer

⑆0000093300⑆

⑆0210⑉0030⑆0056 0⑉29013⑆

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
1/11/65	
for part	
payment	
to Capital	
Account, Inc.	
Chaplin	
7/11 & 7/12	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	5281

PAY TO THE ORDER OF Nelson Travel Service 5281

Five thousand two hundred eighty-one and no/100 DOLLARS

MANUFACTURERS HANOVER TRUST COMPANY
2100 WHITE PLAINS ROAD, BRONX, N. Y.

THE NEW YORK STATE TEACHERS STUDY GROUP

Sara Friedman, Treasurer

⑆10210⑉0030⑆0055⑉0⑉29013⑆

⑈0000528100⑈

[Tr. 478]

Nelson Travel Service

#113-8855

916.72 A.C.

NR 10855

5045

PAY ANY BANK

JAN 20

NATIONAL BANK OF NEW ROCHELLE, NEW YORK

13 JAN 1965

1-120

21006

13 JAN

EXHIBIT BOE 70

Ex. 482

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
2/8/65	
for past payments on 1965 Capital Equipment One.	
TOTAL OF INVOICES LESS	
AMOUNT OF CHECK	\$100 —

PAY TO THE ORDER OF National Technical Service

Five thousand and no/100 DOLLARS

77076

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Trust

MANUFACTURERS HANOVER TRUST COMPANY

2100 WHITE PLAINS ROAD, BRONX, N. Y.

00210-0030:0056 0-29013
⑈0000500000⑈

[Tr. 482]

- 486 -

EXHIBIT 74

[illegible]

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
2/10/65	
for	
A.A. Travel	
add to pay	
on M.A. Travel	
Carbi Inc	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	2000 -

NO. 625

Feb. 10, 1965

PAY TO THE ORDER OF Religion Travel Service 2000.00

Two thousand and no/100 DOLLARS

MANUFACTURERS HANOVER TRUST COMPANY
815 WHITE PLAINS ROAD, BRONX, N. Y.

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Treas.

⑆000000200000⑆

⑆10210⑉0030⑉0055 0⑉29013⑆

Religion Travel Service
113-8855

1-20 PAY ANY BANK, P.O. BOX 113-8855 NEW YORK, N.Y.

1-20 FEB 15 1965

1-20 FEB 15 1965

1-20 FEB 15 1965

- 489 -

[Tr. 485]

EXHIBIT BOE 77

Tr. 485

[Tr. 486]

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING		DATE		AMOUNT	
2/15/65					
balance due on					
Aeromarine					
Newman					
Charter					
TOTAL OF INVOICES					
LESS					
AMOUNT OF CHECK				5532-	

PAID

Feb 15 1965

PAY TO THE ORDER OF Nelson Travel Service \$5532.00

Five thousand five hundred thirty two and 00/100 DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

MANUFACTURERS HANOVER TRUST COMPANY

8100 WHITE PLAINS ROAD, BRONX, N. Y.

Sari Friedman, Treas.

⑆0210⑉0030⑆0056 0⑉29013⑆ ⑆0000553200⑆

FOR DEPOSIT

MAILED TREASURER SERVICE

#113-6655

AK 6261 FEB 16 65 0000014

PAY ANY BK. OR CR. OR TR. CO. P.C.

15105

90310

3 1-120 3 FEB NEW YORK 3 591621

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING					
DATE		AMOUNT			
2/23/65					
on account					
summer					
program					
TOTAL OF INVOICES					
LESS					
AMOUNT OF CHECK	6000	-			

NO.

FEB 23 1965

16000.00

Six thousand and no/100 DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

MANUFACTURERS HANOVER TRUST COMPANY

57067

210210-003010056 0-29013P

100006000000

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

DATE	AMOUNT
2/27/65	
for deposit	
to World	
airways	
on freight	
charter	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	

NO. 633

Feb. 27 1965

PAY TO THE ORDER OF *Nelson*

Service \$10,500.00

and 100 DOLLARS

MANUFACTURER'S OVERSEAS TRUST COMPANY

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Treas.

56

10000501000

50-157

PAY ANY OK, BKR, OR TR. CO, P.E.C.

NATIONAL BANK OF WESTCHESTER

NEW ROCHELLE, NEW YORK

WESTCHESTER NATIONAL BANK

in accordance with the provisions of the New York State Banking Law

EXHIBIT BOE 81

[Tr. 489]

- 493 -

Tr. 489

Tr. 490

[Tr. 490]

EXHIBIT BOE 82

- 494 -

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING ACCOUNT	
DATE	2/27
FOR CAPITAL AIRWAYS, INC.	
DEPOSIT ON 7/4-9/5	
CHESTER	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	

1617

RECEIVED
FEB 28 1965
TRUST CO. OF NEW YORK
150 WHITE PL. RD. BRONX, N. Y.

PAY TO THE ORDER OF Reber Travel Service \$1000.00

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Pres.

100000100000

50 5590 MM 01 65 000012

NATIONAL BANK OF WESTCHESTER
NEW ROCHELLE, NEW YORK

50 157

PAY ANY BR. BKR. OR TR. CO. P.E.C.

WESTCHESTER NATIONAL BANK

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

NO. 643

DATE 3/6/65

AMOUNT 5000.00

PAY TO THE ORDER OF Nelson Group Travel Corp.

5000.00 DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

MANUFACTURERS HANOVER TRUST COMPANY

100 WHITE PLAINS ROAD, BRONX, N. Y.

Sari Friedman, Treas.

TOTAL OF INVOICES

LESS

AMOUNT OF CHECK 5000.00

⑆0210⑆0030⑆0056 0⑆290⑆

⑈0000500000⑈

[Tr. 491]

- 495 -

Tr. 491

EXHIBIT BOE 83

354

PER PAY BRY BANK

P. E. G.

1000

14/11

9 63 07357

FIRST WESTCHESLER NATIONAL BANK

NEW ROCHELLE NEW YORK

NEW ROCHELLE OFFICE

354

Nelson Group Travel Corp
for deposit to
acct # 119-994-3

NO. 663

Mar. 15 '65 1:30 PM

DATE	AMOUNT
3/15/65	
for Capital	
Training	
get check	
Ramy	
Paper	
7/1-9/1/65	
TOTAL OF INVOICE	
LESS	
AMOUNT OF CHECK	

PAYABLE ONLY IF CHECK IS
SINCE RESERVE ICE HAS
PROPERLY IN-CHARGE

MAR 15 1965

PAY ORDER

MANUFACTURERS TRAVEL CORP.
1115 WHITE PLAINS RD.
BRONX, N.Y. 10460

THE NEW YORK STATE TEACHERS STUDY GROUP

5000.00 DOLLARS

Sari Friedman, Treas.

210-0030:0056 0-290

100000500000

119-991413

When Group Travels

PAY ANY BANK, P.E.O. 1-120 1965

PAY ANY BANK, P.E.O. 1-120 1965

1-120 1965

17 MAR

NEW YORK NATIONAL BANK
NEW YORK
NEW ROCHELLE OFFICE

- 499 -

[Tr. 495]

EXHIBIT BOE 87

Tr. 495

THIS CHECK IS FULL PAYMENT OF THE FOLLOWING	
DATE	AMOUNT
3/15/65	
for Equity	
and Equity	
7/7/64	
Home in	
Paris	
56	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	5000

PAYEE'S ONLY INFORMATION
 SINCE ISSUANCE AND
 PROPERLY ENDORSED
 MAR 15 1965

MANUFACTURERS HANOVER TRUST COMPANY
 155 WHITE PLAINS ROAD, BRONX, N. Y.

AUTHORIZED SIGNATURE
 NOT TO BE DESTROYED

NO. 663
 Mar. 15 1965
 1-30
 216

\$5000.00
 DOLLARS
 THE NEW YORK STATE TRADING STUDY GROUP
 Sam Friedman, Treas.

1:0210-0030:0056 0-290
 700005000007

**PAY TO THE
ORDER OF**

PAY TO THE ORDER OF Nelson Group Travel Corp. 366 ²⁵/₁₀₀
Three hundred and sixty six and 25/100 DOLLARS

**MANUFACTURERS MANOVER
TRUST COMPANY
2186 WHITE PLAINS ROAD, BRONX, N. Y.**

THE NEW YORK STATE TEACHERS STUDY GROUP

Sari Friedman, Treas.

010210-003010056 0-29013

0000036625

NO. 664

Mar. 15, 1965

100

[Tr. 497]

- 501 -

EXHIBIT B05 89

267. 班

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING		AMOUNT
3/24/65		
for additional		
part way to		
Capital Airways		
Charter #1		
7/5-9/65		
7/5-9/65		
TOTAL OF INVOICES		
LESS		
AMOUNT OF CHECK		10000 -

1552714

CERTIFIED

PAYABLE ONLY IF UNALTERED
SINCE ISSUANCE AND IF
PROPERLY ENDORSED

PAY TO THE ORDER OF NEW YORK STATE TEACHERS STUDY GROUP \$10,000.00

MANUFACTURERS TRUST COMPANY 56 WHITE PLAINS RD. NEW YORK, N.Y. 10408

TRUST COMPANY

1100 WHITE PLAINS ROAD, BRONX, N.Y.

AUTHORIZED SIGNATURE Sam Friedman, Pres.

DO NOT DESTROY

⑆0210⑉0030⑆0056 0⑉290⑉⑆

⑆0001000000⑆

[Tr. 498]

- 502 -

EXHIBIT BOE 90

[illegible]

THIS CHECK IS IN FULL PAYMENT OF THE FOLLOWING

DATE	AMOUNT
for final	
payment to	
British Corp.	
Group Inc.	
for 1/2	
share	
TOTAL OF INVOICES	
LESS	
AMOUNT OF CHECK	24957

PAY TO THE ORDER OF Nelson Group Travel Corp. 12495755

May 1, 1961

Twenty four thousand nine hundred fifty seven and 55/100 DOLLARS

THE NEW YORK STATE TRADING STUDY GROUP

MANUFACTURERS HANOVER TRUST COMPANY
210 WHITE PLAINS ROAD, BRONX, N. Y.

Sari Friedman, Treas.

⑈0210⑈0030400⑈ ⑈0⑈290⑈

Nelson Group
Nelson Group Travel Corp.
Michael P. Friedman

DEDICATED TO
ACCT. OF THE PAYEE
Absence of Endorsement
Guaranteed
FIRST TRAVELER ENTERAL BANK
NEW ROCHELLE, N. Y.

2495755

PAY TO THE ORDER OF *Mr. J. H. ...*
Twenty thousand and no/100
MANUFACTURERS HANOVER TRUST COMPANY
 2
 215 WHITE PLAINS ROAD, BRONX, N. Y.

no. 787


May 14 1965

PAY TO THE ORDER OF Ree's Cruise Travel Corp. 20932 ⁴⁰/₁₀₀
Twenty thousand nine hundred thirty-two and ⁴⁰/₁₀₀ DOLLARS

THE NEW YORK STATE TEACHERS STUDY GROUP

Ari Friedman, Treasurer

• 1:03:00 00:005 0-290

Nelson Group
 Travel Exp
 Donald Glen
 Thompson Truck
 H.A. for silver credit
 & let Jack look into
 Bank: 

[Tr. 503]

- 507 -

EXHIBIT BOE 95

III. 503

- 509 -

Tr. 506

[Tr. 505]

EXHIBIT BOE 98

Payable to order of

Pay to the order of

January 11, 1951

\$5281.00

THE SUM 5281 DOLS 00 CTS

NATIONAL BANK of WESTCHESTER

NELSON TRAVEL SERVICE

Michael A. Friedman

542

10000508100

100-263-01570

100-8855

[Tr. 506]

cc Account

Carlot Insurance Inc

Derry field

Whitell Tennessee


542 Park

100-263-01570

100-8855

[Tr. 507]

For N.Y.S.T.C.
SWT CHARTER
JULY 1 - SEPT 2

 **NATIONAL TRAVEL SERVICE**
40 FIFTH AVENUE
NEW YORK, N. Y. 10001

662

2/8 *10/10/71*

5.00

CAPITAL AIRWAYS, Inc

THE SUM IS \$5.00-20 CTS

NATIONAL BANK OF WESTCHESTER

N B W

NATIONAL TRAVEL SERVICE

Michael J. Fisher

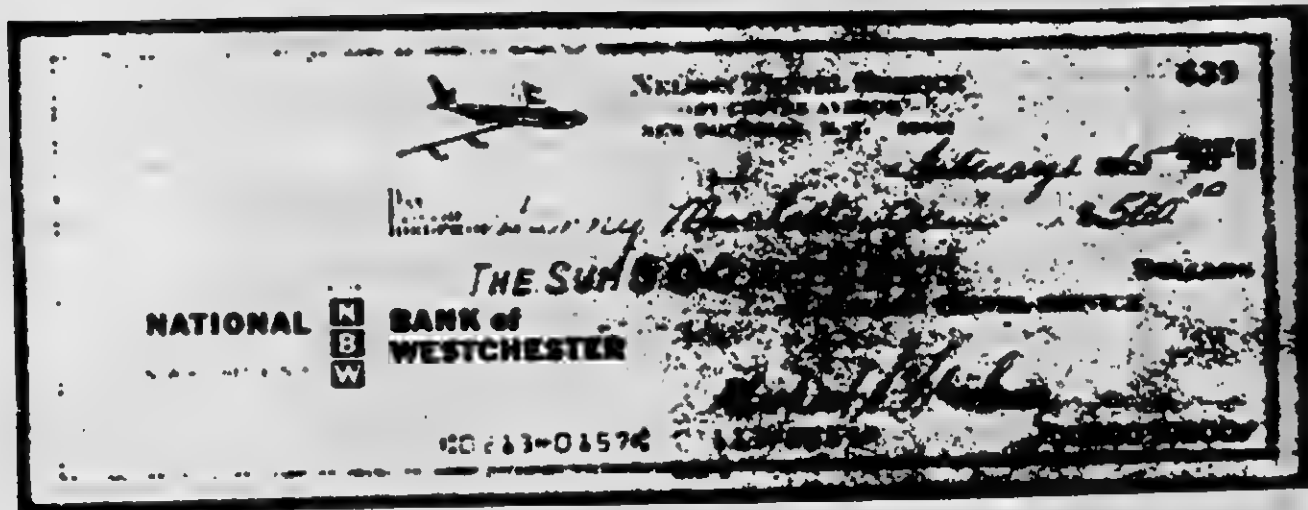
80263-01878 53-8855 10000548530

- 511 -

Tr. 510

[Tr. 509]

EXHIBIT BOE 100



[Tr. 510]



Tr. 511

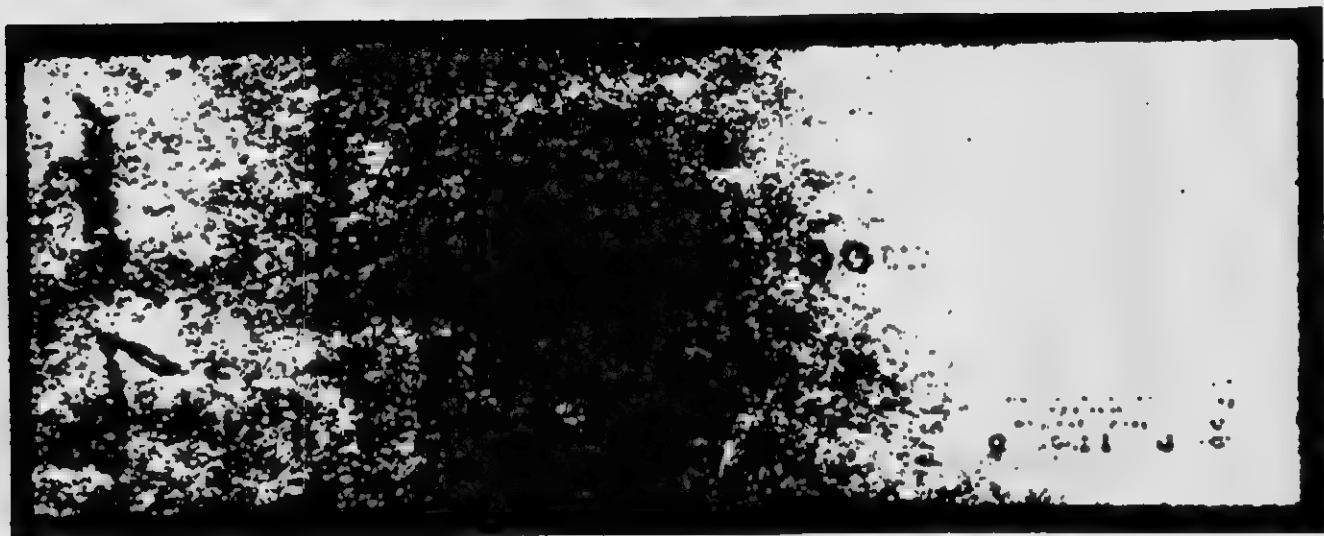
- 512 -

EXHIBIT BOE 101

[Tr. 511]



[Tr. 512]

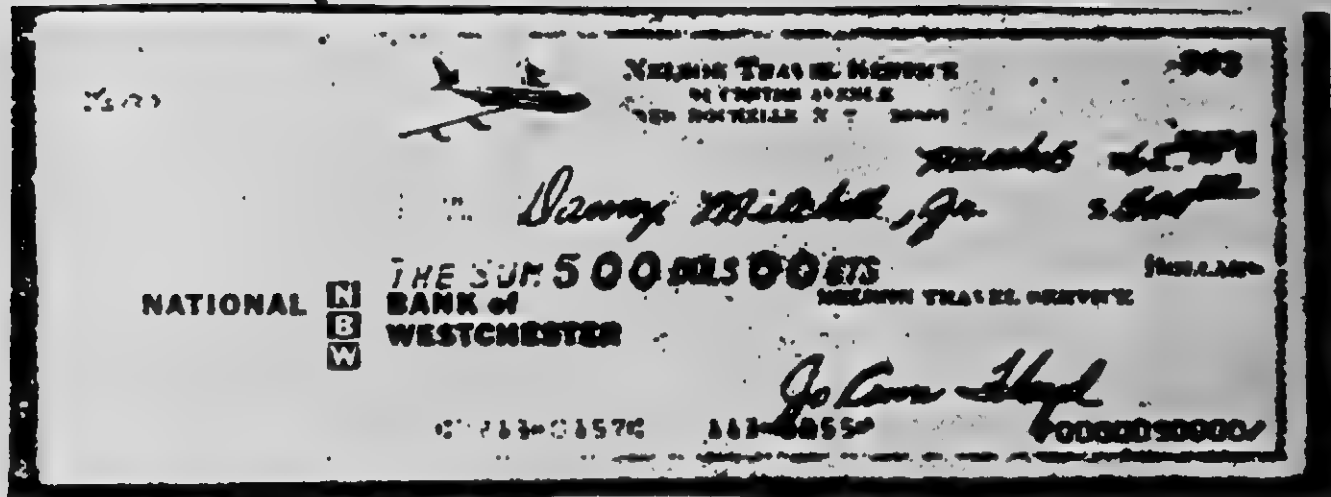


- 513 -

Tr. 514

[Tr. 513]

EXHIBIT BOE 102



[Tr. 514]

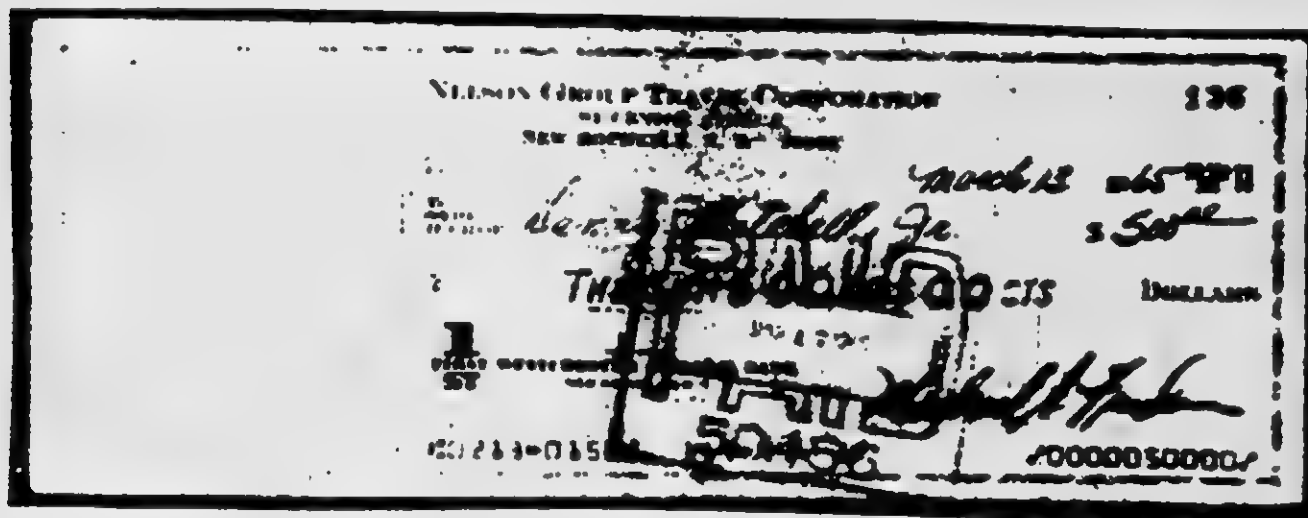


Tr. 515

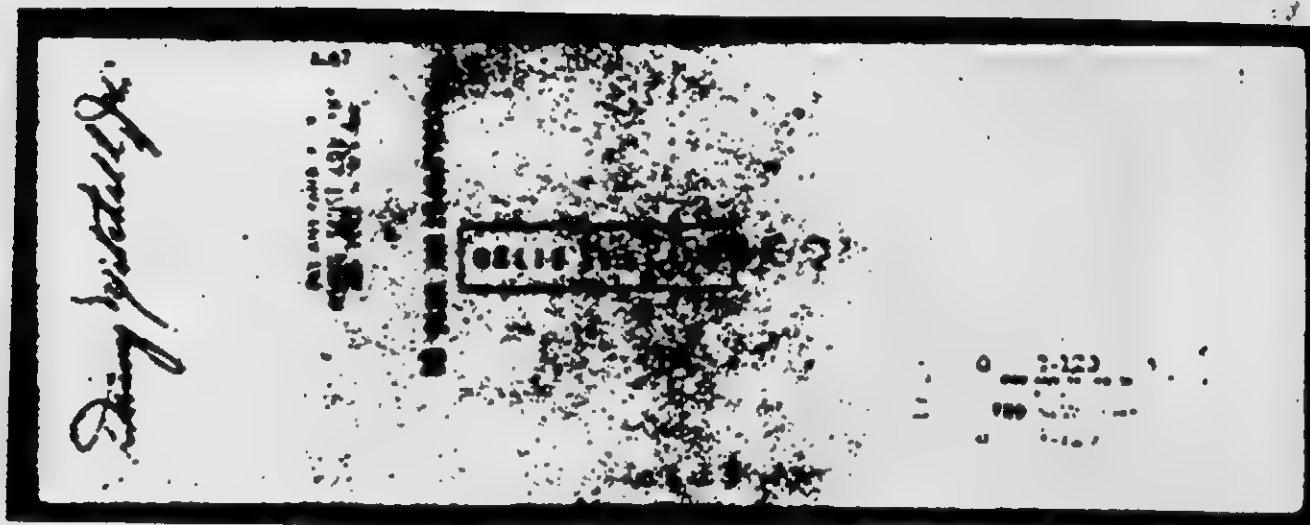
- 514 -

EXHIBIT BOE 103

[Tr. 515]



[Tr. 516]

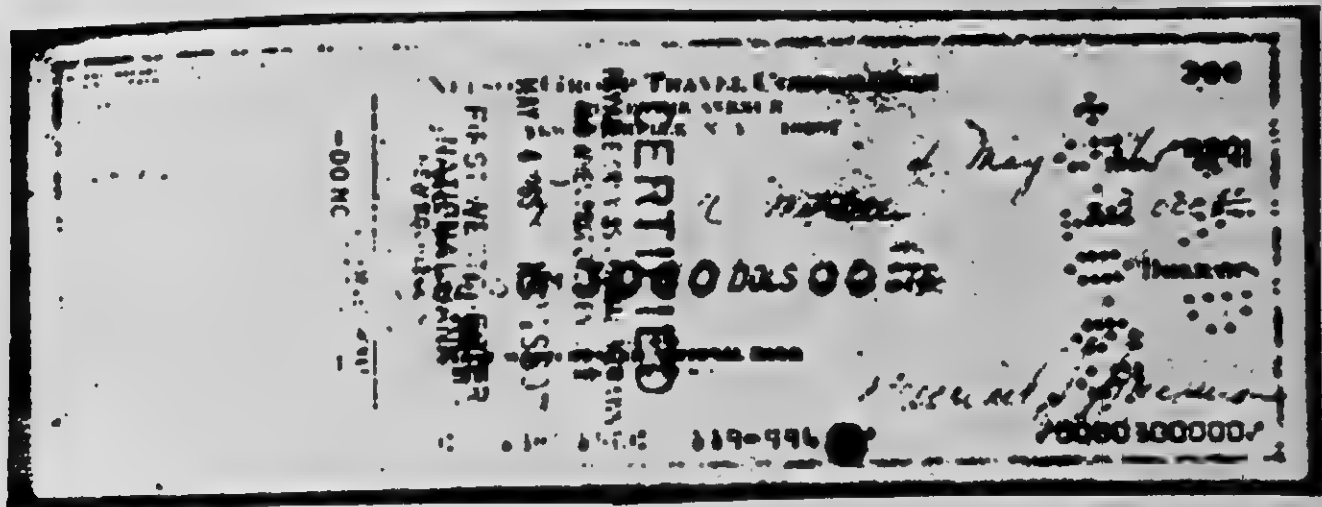


- 515 -

Tr. 518

[Tr. 517]

EXHIBIT BOE 104



[Tr. 518]



[Tr. 520]

CAPITOL AIRWAYS, INC.
535 Fifth Avenue
New York, N. Y. 10017
YUkon 6-1320

April 2, 1965

Mr. Michael Friedman
NELSON TRAVEL SERVICE
81 Centre Avenue
New Rochelle, New York

Dear Mike:

In accordance with a telephone conversation with Mr. Dancer of Simmons Group Journeys, Inc. we are cancelling the charter flight for the "New Knickerbocker League of Childrens Asthma Research Institutes and Hospitals." (NY/Montego Bay May 27, 1965-Montego Bay/NY May 31, 1965)

Since you have a deposit in the amount of \$1,044.75 on this charter we would like to know if you desire a refund or the transferral of the deposit to other charters you are holding.

There are a substantial amount of monies due CAPITOL and we would appreciate receiving your check.

On the attached pages you will find a list indicating the charters you have with us to date and the payment schedule on each one.

Thanking you for your continued cooperation, we remain,

Very truly yours,

CAPITOL INTERNATIONAL AIRWAYS

/s/ Daniel A. Mitchell, Jr.

Daniel A. Mitchell, Jr.
District Sales Manager

DAM:PK

Dates Charterer-Itinerary Charter Price	Amount due.	Date	Additional Payments	Due Date	Commission	Net Due
United Federation of Teachers #1 NY/Montego Bay/NY April 17-24 \$10,447.50	\$ 4,701.37	3-17	Paid CK#353 2/27/65 on Nelson Travel		\$ 522.38	Due *\$ 4,178.99
United Federation of Teachers #2 NY/Montego Bay/NY April 17-24 \$10,447.50	4,701.38	2-17	\$ 4,701.37	3-17	522.38	* 8,880.37
N.Y.S. Teachers Study Group NY/Paris-Rome/ /Paris/NY July 1 Sept 3 \$52,331.00	*20,932.10	3-01	20,932.10	5-1	2,616.55	39,248.25
World Youth Culture, Inc. NY/Paris/NY July 16-Aug 28 \$26,506.00	11,927.70	5-16	11,927.70	6-16	1,325.30	22,530.10
Sealy Mattress NY/Montego Bay/NY May 15-22 \$10,447.50	* 4,701.38	3-15	4,701.37	4-15	522.38	8,880.37

Amount due CAPITOL as of April 2, 1965

\$38,693.14

*Due Now

Less credit for payments made on two
cancelled charters:

Blasters Drillers and Miners
New Knickerbocker League

10,402.75
1,044.75

Net amount due

\$27,245.64

Tr. 521

- 518 -

[Tr. 521]

EXHIBIT BOE 107

- 519 -

Tr. 522

[Tr. 522]

BOE EXHIBIT 108

MARTIN FESTINGER BOE 108 No. 27
LAURA FESTINGER
April 26 1965 1-12
210
PAY TO THE ORDER OF New York State Teachers Study Group Inc. 240.00
Two Hundred & Forty 00 DOLLARS
CHEMICAL BANK NEW YORK TRUST COMPANY
EAST KINGSBRIDGE RD. & CRESTON AVE.
BRONX, N. Y.
MAY 1 1965
00210-00121 055-5038151 0000024000

[Tr. 523]

BOE EXHIBIT 108

1-12 MAY 1965
PAY TO THE ORDER OF
Manufacturers Trust Company
The New York State Teachers Study Group
0056 024013
1-12 MAY 1965
NEW YORK N. Y.
1-12
1-12 MAY 1965
NEW YORK
1-12

NEW YORK STATE TEACHERS STUDY GROUP, INC.
2260 BRONX PARK EAST, BRONX, N.Y. 10467
212-OL-5-4961- IF NO ANSWER-YU-8-6500

Tr. 524

RECEIVED FROM Martin Festinger \$ 240
NAME (Two hundred forty dollars)
FOR 21 SEATS ON Charter # 3 Rome - Paris 7/1 - 9/3

PAYMENT OF \$ DUE BY

PAYMENT OF \$ DUE BY

Paid in full \$12.00

BOE 109

FLIGHT COMMITTEE

[Tr. 524]

- 520 -

BOE EXHIBIT 109

NEW YORK STATE TEACHERS STUDY GROUP

2260 BRONX PARK EAST, BRONX, NEW YORK 10467

212-OL-5-4961- IF NO ANSWER 212-YU-8-6500

4TH YEAR

ALL SUMMER		JET	CHARTER FLIGHT	
NEW YORK-LONDON			PARIS-NEW YORK	\$270⁰⁰
JULY 2ND			SEPT. 4TH	

ALL SUMMER		JET	CHARTER FLIGHT	
NEW YORK-PARIS			PARIS-NEW YORK	\$280⁰⁰
JULY 1ST			SEPT. 3RD	

ALL SUMMER		JET	CHARTER FLIGHT	
NEW YORK-ROME			PARIS-NEW YORK	\$310⁰⁰
JULY 1ST			SEPT. 3RD	

SHORT FLIGHT		"BRITANNIA" CHARTER FLIGHT		
8½ HOURS - NON STOP				
NEW YORK-LONDON		JET	LONDON-NEW YORK	\$239⁰⁰
JULY 19TH		PROP	AUG. 20TH	

- 521 -
[Tr. 525]

EXHIBIT BOE 110

Tr. 525

FOR THE ORIENT SEE OUR "ORIENT BROCHURE" **OPTIONAL TOURS AVAILABLE**

1. GRAND EUROPEAN TOUR	-45 DAYS-		\$685.00
2. GREECE, ISRAEL, TURKEY (EXTENSION OF NO. 2) ?	-30 DAYS-		\$815.00
3. SPAIN AND PORTUGAL	-15 DAYS-		\$338.00
4. HISTORY STUDY TOUR *	-50 DAYS-	OPTIONAL 10 DAYS RUSSIA	\$990.00
5. GRADUATE ART STUDY TOUR *	-50 DAYS-		\$985.00
* POSSIBILITY OF CREDIT			

ASK FOR INFORMATION REGARDING SUMMER STUDY SESSIONS ABROAD

ELIGIBILITY

MEMBERS OF THE NEW YORK STATE TEACHERS STUDY GROUP AND THEIR IMMEDIATE FAMILIES (SPOUSE, DEPENDENT CHILDREN AND PARENTS RESIDING IN SAME HOUSEHOLD).

ALL RESERVATIONS SUBJECT TO PROOF OF ELIGIBILITY.

RULES AND REGULATIONS OF CAB AND IATA STRICTLY ENFORCED.

CLASS OF SERVICE
This is a message
unless its class char-
acter is indicated by the
proper symbol

WESTERN UNION TELEGRAM

W. P. MARSHALL, President

SF-1201 (4-60)

SYMBOLS
DL = Day Letter
NL = Night Letter
LT = International
Letter Telegram

The time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination.

NJ051 (16)PLBC065

UDY136 UDZ5 UDZ5 NL PD UD NEW YORK NY 28

1965 JUN 29 AM 1 23

SID NESCHIS

1730 MONTGOMERY AVE NYK

YOUR DEPARTURE ON JULY 1 CAPITOL AIRWAYS FLT NY PAR ROME RTN
SEPT - PAR NY IN JEOPARDY OF CANCELLATION DUE NON PAYMENT FROM
NYSTSG. MEETING BEING HELD TUESDAY NIGHT SHELTON TOWERS HOTEL
525 LEXINGTON AVE NYC 9 PM REQUEST YOUR ATTENDANCE WITH ORGANIZATION
OFFICERS

CAPITOL AIRWAYS INC

BOE III

LV S 36138
CY 36500

[Tr. 526]

- 523 -

EXHIBIT BOE III

Tr. 526

[Tr. 527]

GEORGE BERKOWITZ
Counselor At Law
Woolworth Building
233 Broadway
New York, N. Y. 10007

Cortlandt 7-2550

May 11, 1966

Honorable Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Universal Building
Washington, D. C.

Re: Capitol Airways, Inc., Enforcement Proceeding
Docket No. 16370

Dear Mr. Fredricks:

The transcript of the second day's hearing was only received by me yesterday. In reading both volumes of the transcript, I find the following typographical errors and request correction accordingly:

Page 24, line 20

"that the witness is now being recalled to read into the"

should read

"that the witness is now being called to read into the"

Page 54, line 7

"I will, perhaps, in order to enlighten Mr."

should read

"I will, perhaps, in order to lighten Mr."

Page 69, line 16

"Will you please bear with instead of giving"

should read

"Will you please bear with me instead of giving"

Page 153, line 15

"the issues involved in this procedure and it raises entirely"

should read

"the issues involved in this proceeding and it raises entirely"

[Tr. 528]

Honorable Barron Fredricks

May 11, 1966

Page 180, line 13

"They were not required an additional amount."

should read

"They were not required to pay an additional amount."

Page 199, line 9

"your office in an order enjoining and restraining"

should read

"your office in an order for the enjoining and restraining"

Page 202, line 21

"available than the DCA jet airplanes."

should read

"available than the DC-8 jet airplanes."

Page 207, line 16

"I have resisted doing so."

should read

"I have desisted from doing so."

Page 220, line 25

"mind or having to do with purpose and the inclusion of law"

should read

"mind or having to do with purpose and a conclusion of law"

Page 249, line 9

"You heard the previous witness make testimony"

should read

"You heard the previous witness give testimony"

Page 318, line 12

"And the reason I sent the telegram and called"

should read

"And the reason you sent the telegram and called"

Page 346, line 23

"secrets were not transported; he didn't know what to do."

should read

"teachers were not transported; he didn't know what to do."

Page 350, line 9

"it became specifically difficult for me to continue."

should read

"it became especially difficult for me to continue."

[Tr. 529]

Hon. Barron Fredricks

May 11, 1966

Page 357, line 9

"Capitol cease and desist from violating Sections 24.90 and

should read

"Capitol cease and desist from violating Sections 24.90 and, two,"

Page 357, line 11

"Subdivision 2, that Capitol be ordered to cease"

should read

"Third, Subdivision 2, that Capitol be ordered to cease"

I presume that the corrections will be made accordingly and at the same time, I have corrected my copies in ink.

If there is any question about any of the corrections, I would appreciate hearing from you.

Sincerely yours,

/s/ Geo Berkowitz

GEORGE BERKOWITZ

GB/cr

CC Eric J. Byrne, Esq.
V. Michael Straus, Esq.
Seamon & Sullivan, Esqs.
Mr. Francis J. Roach
Mr. Jesse F. Stallings
Mr. Mack Rowe

[Tr. 530]

CIVIL AERONAUTICS BOARD
Washington, D. C. 20428

In Reply Refer To:

May 12, 1966

Mr. George Berkowitz
Counselor at Law
Woolworth Building
233 Broadway
New York, N. Y. 10007

Re: Capitol Airways, Inc.
Enforcement Proceeding
Docket 16370

Dear Mr. Berkowitz:

Without adverting to the merits of the corrections suggested by your letter of the 11th instant may I call your attention to my inability to effect any correction to the transcript of hearing except after compliance with section 302.24(1) of the Rules of Practice, which prescribes filing of a motion (original and nineteen copies) within 10 days after

the Board's receipt (on May 9, 1966) of the completed transcript. There is still ample time for you to file such a motion.

Yours very truly,

Barron Fredricks
Hearing Examiner

cc: Docket Section, B-12, w/incoming

[Tr. 531]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

RECEIVED
DOCKET SECTION
MAY 18 3:41 PM '66
CIVIL AERONAUTICS
BOARD

-----:
CAPITOL AIRWAYS, INC. :
Respondent, :
: :
Enforcement Proceeding :
-----:

Docket 16370

MOTION TO CORRECT TRANSCRIPT

As permitted by Rule 24(1) of the Rules of Practice,^{1/} counsel for the Bureau of Enforcement moves that the transcript in Docket 16370 be corrected as follows:

1. Page 17, line 1, "would" should read "worked";
2. Page 42, line 22, "65" should read "55";
3. Page 58, line 24, "charts" should read "charters";
4. Page 163, line 25, "105" should read "15";
5. Page 173, line 21, "lot" should read "late";
6. Page 186, line 13, "over" should read "on";
7. Volume 2, page A, line 21, "28 thru 54" should read "1 thru 96 and 98 thru 111";
8. Page 202, line 21, "DCA" should read "DC-8";
9. Page 204, line 12, "that" should read "since";

10. Page 206, line 4, "pay" should read "be paid";
11. Page 220, line 10, "of" should read "or";
12. Page 221, line 24, ". . .to speak several people. . . ." should read ". . . to speak to several people. . . .";

1/ 14 CFR 302.24(1).

[Tr. 532]

13. Page 239, line 16, ". . . do you whether. . . ." should read ". . . do you know whether. . . .";
14. Page 257, line 22, "are" should read "were";
15. Page 259, line 2, "transcript" should read "trip";
16. Page 265, line 25, "it" should read "in";
17. Page 271, line 21, "I then displayed and" should read "and displayed. I then";
18. Page 313, line 2, "I state that" should read "I stated that";
19. Page 338, line 16, "for" should read "from"; and
20. Page 355, line 20, "28 through 54" should read "1 through 96 and 98 through 111".

Respectfully submitted,
/s/ V. Michael Straus
V. Michael Straus
Enforcement Attorney

Washington, D. C.

May 18, 1966

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion to Correct Transcript on each party by mailing a copy to counsel of record in a properly addressed, franked envelope, certified mail.

A handwritten signature in black ink, appearing to read 'V. Michael Straus', with a long horizontal flourish extending to the right.

V. Michael Straus
Enforcement Attorney

Washington, D. C.
May 18, 1966

[Tr. 534]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

CAPITOL AIRWAYS, INC.

Respondent, *et al.* Docket 16370
Enforcement Proceeding

MOTION TO CORRECT RECORD

Now comes Capitol Airways, Inc., respondent in the above-captioned proceeding and, pursuant to section 302.24 (1) of the Rules of Practice, moves to correct the transcript of the hearing held before the Honorable Examiner Barron Fredricks on April 19 and April 20, 1966 in New York City.

1. Upon information and belief, the completed transcripts, consisting of two volumes containing 368 pages, were received by the Board on May 9, 1966.

2. Said transcripts by CSA Reporting Corporation contain some typographical errors which require correction as set forth below.

3. An examination of said transcripts by counsel of Capitol Airways, Inc. indicates that the following corrections are required:

(1) Page 24, line 20
"that the witness is now being recalled to read
into the"
should read
"that the witness is now being called to read
into the"

[Tr. 535]

- (2) Page 54, line 7
"I will, perhaps, in order to enlighten Mr."
should read
"I will, perhaps, in order to lighten Mr."
- (3) Page 69, line 11
"Will you please bear with instead of giving"
should read
"Will you please bear with me instead of giving"
- (4) Page 153, line 15
"the issues involved in this procedure and it raises entirely"
should read
"the issues involved in this proceeding and it raises entirely"
- (5) Page 180, line 13
"They were not required an additional amount."
should read
"They were not required to pay an additional amount."
- (6) Page 199, line 9
"your office in an order enjoining and restraining"
should read
"your office in an order for the enjoining restraining"
- (7) Page 202, line 21
"available than the DCA jet airplanes."
should read
"available than the DC-8 jet airplanes."
- (8) Page 207, line 16
"I have resisted doing so. I am"
should read
"I have desisted from doing so. I am"
- (9) Page 220, line 25
"mind or having to do with purpose and the inclusion of law"
should read
"mind or having to do with purpose and a conclusion of law"
- (10) Page 249, line 9
"You heard the previous witness make testimony"
should read
"You heard the previous witness give testimony"
- (11) Page 318, line 12
"And the reason I sent the telegram and called"
should read
"And the reason you sent the telegram and called"

[Tr. 536]

(12) Page 346, line 23

"secrets were not transported; he didn't know what to do."

should read

"teachers were not transported; he didn't know what to do."

(13) Page 350, line 9

"it became specifically difficult for me to continue."

should read

"it became especially difficult for me to continue."

(14) Page 357, line 9

"Capitol cease and desist from violating Sections 24.90 and"

should read

"Capitol cease and desist from violating Sections 24.90 and, two,"

(15) Page 357, line 11

"Subdivision 2, that Capitol be ordered to cease"

should read

"Third, Subdivision 2, that Capitol be ordered to cease"

4. The correction of the transcript of the hearing as aforesaid will cause no prejudice to any party, and for the sake of accuracy and clarity, it is respectfully requested that this motion be granted and the record be corrected as hereinabove set forth.

WHEREFORE, Capitol Airways, Inc. respectfully requests that this motion be granted and the record be corrected as above outlined.

Respectfully submitted,

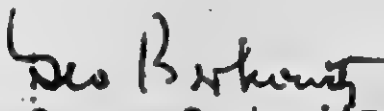
CAPITOL AIRWAYS, INC.

By: *George Berkowitz*
GEORGE BERKOWITZ
Attorney for
Capitol Airways, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion upon Honorable Barron Fredricks, Hearing Examiner, Eric J. Byrne, Esq. and V. Michael Straus, Esq., Attorneys for the Bureau of Enforcement, Civil Aeronautics Board, and CSA Reporting Corporation.

May 18, 1966


/s/ George Berkowitz
George Berkowitz

[Tr. 537]

CIVIL AERONAUTICS BOARD
Washington, D. C. 20428

June 1, 1966

CAPITOL AIRWAYS, INC.
ENFORCEMENT PROCEEDING
DOCKET 16370

NOTICE TO ALL PARTIES:

Upon consideration of the motions filed pursuant to Rule 24(1) of the Rules of Practice the transcript of the hearing in Docket 16370 will be changed as follows:

On page 199, line 9 will read

"your office for an order enjoining and restraining"

On page 202, line 21 will read

"available DC-8 jet airplanes."

On page 357, line 9 will read

"Capitol cease and desist from violating Section 249.10 and".

Capitol's proposed change number (15) does not involve an error affecting substance and is not approved. All the remaining corrections proposed by Capitol and by the enforcement attorney are approved and the transcript is changed to reflect those corrections.

/s/ Barron Fredricks

Barron Fredricks
Hearing Examiner

[Tr. 538]

CIVIL AERONAUTICS BOARD
Washington, D.C. 20428

In Reply Refer To: B-52
F-65-6

May 27, 1966

Examiner Barron Fredricks
Civil Aeronautics Board
Washington, D. C. 20428

Dear Examiner Fredricks:

Re: Capitol Airways, Inc., Enforcement Proceeding,
Docket 16370

At the formal hearing in the Capitol case, you stated that briefs to the Examiner should generally conform to the requirements for briefs to the Board. These requirements limit briefs to 50 double-spaced pages, with pages of any appendix included in the 50-page limitation.

Unfortunately, the appendix section of my brief will contain several pages. If it is agreeable with counsel for Capitol, I wish to make the following request:

1. That the basic argument section of the briefs may be one and one-half spaced, rather than doubled-spaced,
2. That proposed findings and conclusions and requests for relief, if any, may be single-spaced, rather than double-spaced, and
3. Briefs should otherwise conform to the requirements of 14 CFR 302.31.

I request that the foregoing deviations from Rule 31 be applicable to the briefs of each party. Copies of this letter are being sent to counsel for Capitol, so that they may answer within the near future.

Very truly yours,

/s/ V. Michael Straus
V. Michael Straus
Enforcement Attorney
Bureau of Enforcement

cc: George Berkowitz, Esq.
Theodore I. Seamon, Esq.

[Tr. 539]

Theodore I. Seamon
Joseph D. Sullivan
Lawrence D. Wasko

Law Offices
SEAMON AND SULLIVAN
Woodward Building
Washington, D. C. 20005

Telephone
REpublic 7-8040

May 31, 1966

Examiner Barron Fredricks
Civil Aeronautics Board
Washington, D. C. 20428

Re: Capitol Airways, Inc., Enforcement
Proceeding, Docket 16370

Dear Mr. Examiner:

We are in receipt of copy of letter from Enforcement Attorney requesting revision in the physical requirements governing briefs to the Examiner in the above-captioned proceeding.

This will advise, on behalf of Capitol, that we have no objections to the Enforcement Attorney's request.

Sincerely yours,

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

cc: V. Michael Straus, Esquire
George Berkowitz, Esquire

[Tr. 540]

CIVIL AERONAUTICS BOARD
Washington, D. C. 20428

In Reply Refer To:

June 1, 1966

Mr. V. Michael Straus
Enforcement Attorney
Bureau of Enforcement
Civil Aeronautics Board
Washington, D. C. 20428

Re: Capitol Airways, Inc.,
Enforcement Proceeding, Docket 16370

Dear Mr. Straus:

The deviations from Rule 31 proposed by your letter of May 27, 1966,
to which Capitol has no objection, will be in order.

Yours very truly,

Barron Fredricks
Hearing Examiner

cc: Mr. George Berkowitz
Attorney for Capitol Airways, Inc.

Mr. Theodore I. Seamon
Attorney for Capitol Airways, Inc.

Chief Examiner, B-100

Docket Section, B-12, with incoming

[Tr. 541]

Theodore I. Seamon
Joseph D. Sullivan
Lawrence D. Wasko

Law Offices
SEAMON AND SULLIVAN
Woodward Building
Washington, D. C. 20005

Telephone
REpublic 7-8040

May 27, 1966

The Honorable
Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Washington, D. C. 20428

Re: Capitol Airways, Inc.,
Enforcement Proceeding, Docket 16370

Dear Mr. Examiner:

It is respectfully requested that the date for submission of briefs
to the Examiner in the above-captioned proceeding be postponed from the
presently assigned date of June 20, 1966, to July 25, 1966.

As you are aware, the undersigned is Associate Counsel of record with Mr. George Berkowitz on behalf of the respondent in this proceeding. This office will participate with Mr. Berkowitz in the drafting of the brief and will have the ultimate responsibility for the final submission thereof. As you are aware, while the hearing only lasted two days, receipt of the transcript was delayed and a substantial number of documentary exhibits were introduced by the Bureau. While the time period originally assigned might otherwise have constituted a reasonable period, there are special circumstances which require this request for extension. We are presently engaged in preparation of exhibits, briefs and for oral argument in a number of pending proceedings before the Civil Aeronautics Board. I will not be in the city for a good part of the month of June, and the normal summer vacation schedules of others who will be involved, impose added burdens upon the meeting of all deadlines during the summer period.

This request is being made well in advance of the due date so that all counsel involved will have early knowledge for their own scheduling purposes.

Respectfully,

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

cc: Eric J. Byrne, Esquire

P.S. I am authorized to state that the Bureau of Enforcement has no objection to the grant of this request.

/s/ T.I.S.

T.I.S.

[Tr. 542]

CIVIL AERONAUTICS BOARD
Washington, D.C. 20428

In Reply Refer To:

May 31, 1966

Mr. Theodore I. Seamon
Attorney for Capitol Airways, Inc.
Woodward Building
Washington, D. C. 20005

Re: Capitol Airways, Inc.,
Enforcement Proceeding, Docket 16370

Dear Mr. Seamon:

On the basis of your letter of the 27th instant, the date for submission of briefs to the examiner is postponed as you request. Instead of the date heretofore assigned those briefs will be submitted on July 25, 1966.

Yours very truly,

Barron Fredricks
Hearing Examiner

cc: Mr. George Berkowitz
Attorney for Capitol Airways, Inc.

Mr. V. Michael Straus
Counsel for the Bureau of Enforcement

Chief Examiner, B-100

Docket Section, B-12, w/incoming

[Tr. 543]

Theodore I. Seamon
Joseph D. Sullivan
Lawrence D. Wasko

Law Offices
SEAMON AND SULLIVAN
Woodward Building
Washington, D. C. 20005

Telephone
REpublic 7-8040

July 19, 1966

The Honorable Barron Fredricks
Hearing Examiner
Civil Aeronautics Board
Washington, D. C. 20428

Re: Capitol Airways, Inc.
Enforcement Proceeding, Docket 16370

Dear Mr. Examiner:

This will confirm my oral request of this date for extension of time for submission of briefs to the Examiner in the above-captioned proceeding from the presently due date of July 25, 1966 to August 15, 1966.

This requested postponement is required and justified by the considerations and circumstances explained to you this date and also communicated orally to the Bureau of Enforcement. The considerations include, as explained, inter alia, procedural dates in other proceedings established on an expedited basis since the assignment of the present brief date and other intervening developments which have affected the immediate workload and calendars of this office.

Respectfully,

/s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

cc: Monte Lazarus, Esq.
Bureau of Enforcement, CAB

[Tr. 544]

CIVIL AERONAUTICS BOARD
Washington, D. C. 20428

In Reply Refer To:

July 20, 1966

Mr. Theodore I. Seamon
Attorney for
Capitol Airways, Inc.
Woodward Building
Washington, D. C. 20005

Re: Capitol Airways, Inc.,
Enforcement Proceeding, Docket 16370

Dear Mr. Seamon:

On the basis of your letter of the 19th instant and of your oral advice that the Bureau of Enforcement does not object to the 3-week extension, the date for submission of briefs to the examiner in the subject proceeding is postponed to August 15, 1966.

The parties are expected to meet the new brief date, which is 56 days beyond the time originally assigned.

Yours very truly,

Barron Fredricks
Hearing Examiner

cc: Monte Lazarus, Esq.
Bureau of Enforcement, CAB

Chief Examiner, B-100

Docket Section, B-12, w/incoming

- 543 -

[Tr. 545]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Original

Tr. 545

RECEIVED
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AUG 15 3 34 PM '66

CIVIL AERONAUTICS
BOARD

CAPITOL AIRWAYS, INC.
Respondent

Enforcement Proceeding

Docket 16370

BRIEF OF
CAPITOL AIRWAYS, INC.,
BEFORE
EXAMINER BARRON FREDRICKS

SEAMON AND SULLIVAN
700 Woodward Building
Washington, D. C. 20005

GEORGE BERKOWITZ, Esquire
233 Broadway
New York 7, New York

Attorneys for
Capitol Airways, Inc.

August 15, 1966

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[Tr. 547]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

CAPITOL AIRWAYS, INC. :
Respondent :

Docket 16370

Enforcement Proceeding :
:

BRIEF OF
CAPITOL AIRWAYS, INC.,
BEFORE
EXAMINER BARRON FREDRICKS

I. INTRODUCTION

This case involves a complaint by the Enforcement Attorney docketed for enforcement by the Bureau of Enforcement (hereinafter referred to as BOE) arising out of a single flight of Capitol Airways involving unusual circumstances never previously experienced or subsequently experienced by Capitol. The Bureau has charged that Capitol violated Section 403(b) of the Act, alleging that "Capitol charged, demanded, collected, and received a greater compensation for air transportation than the rates, fares, and charges specified in its currently effective tariffs, . . ."

The Bureau also charged that Capitol did not obtain Statement of Supporting Information prior to flight and certified passenger manifest prior to flight required by Sections 295.12 and 295.35 or did not retain same as required by Section 249.10 and was accordingly in violation of said provisions of the Regulations.

The evidence of record shows that Capitol did not in fact receive more than its applicable tariff rate. As hereinafter shown, the record established that the complications which led to the complaint in issue involved singular circumstances arising out of the relationship of the President and charter organizer of the chartering organization, on the one hand, and the "Agent"; and

[Tr. 548]

the larceny by the "Agent" of monies entrusted to him and to be disbursed by him, for, on behalf of, and at the direction of the chartering organization, through his wife, the President and charter organizer, who also disappeared at the same time as her husband, just prior to the scheduled operation of the flight.

Capitol's actions, as hereinafter established, were taken in good faith on the advice of experienced counsel. The collection from the charter participants of a pro rata portion of the deficiency was made because of hardship pleas of the charter participants and as an alternative to cancellation of the flight. The action was taken on advice of counsel that had Capitol not required full payment, it would have been legally guilty of the very violation of Section 403(b) now being pressed by the Bureau. It is not contested that a private wrong was committed insofar as the charter participants were concerned, including not only the 183 to whom Capitol met its commitment, but to the many hundreds of other members of the chartering organization who had in the aggregate paid many thousands of dollars to their President and charter organizer, and through her, to her husband, for trips tentatively committed by other carriers who took the course of canceling.

Capitol is contesting this proceeding on a basic legal principle because if the theory of the Bureau is sustained, carriers in routing dealings with "agents," selected by charter organizations and with whom charter carriers are forced to deal, especially under the circumstances here present, would be subjected to extreme jeopardy. This is a case where a chartering organization relied upon an agent, as its agent, for many purposes, including the entrusting of substantial sums of money to him, and in the face of a contract clearly putting the chartering organization on notice that all checks should be made payable to the carrier. If it is to be concluded, nevertheless, as the Bureau would urge, that the agent received the funds, commingled with other funds from the charterer and his own funds, as agent for the carrier and not as agent for

[Tr. 549]

the charterer, the carrier would indeed be penalized and placed in substantial jeopardy by the actions of any chartering group who prefers for one reason or another, as in the present case, to entrust the intermediary with their monies to disburse them as their agent.

Under the theory advanced by the Bureau that the carrier, because it signed a limited "agency" agreement with the agent, is responsible for all the agent's actions, carriers could, by reductio ad absurdum, be liable for secretarial services, payments for stationery, printing costs of brochures, even flights contracted to other air carriers, and for the expenses of substitute transportation purchased, and damages incurred by charter participants when flights on other carriers are canceled because of nonpayment. It is for this reason that Capitol, faced with the possibility of liability in an unknown degree, not otherwise imposed by law, possibly amounting to hundreds of thousands of dollars, has been constrained to defend this proceeding.

The wrong committed against the members of the chartering organization was not committed by Capitol, but by the husband of their President and representative, who unlawfully converted the money to his own use after being entrusted with the funds by his wife as her agent and agent of the chartering group, to make disbursement thereof as instructed or to the extent discretion was given thereto.

If the theory upon which the Bureau apparently relies is sustained, that a part of the \$165,000 was constructively paid to Capitol by reason of the fact alone that it had an "agency" agreement of a limited nature with the husband of the charterer's president, then by the same token the other carriers who canceled their flights after making commitments of aircraft to the agent of the charterer also would be legally responsible to the many hundreds of individuals who were in fact stranded. As Mr. Roach, Vice President of Capitol, testified in response to questions of counsel:

"Q Now, Mr. Roach, had Capitol Airways in the years of its operation ever had a similar problem?

[Tr. 550]

- A To the best of my knowledge I never heard of anything even closely resembling this.
- Q And since this July 1, 1965, flight, has Capitol Airways had a similar problem?
- A Absolutely not.
- Q Neither before nor after?
- A Neither before nor after. That's correct.

* * * * *

- "Q Do you feel it would be better to cancel the flight?
- A I am absolutely certain that, if we had been the coward that the other airlines were in this whole transaction, we wouldn't be sitting here in this room.
- Q What do you mean?
- A I believe that we were the ones that took a public responsibility to these people, gave them an opportunity to cure the problem, and secure the transportation. The other carriers just said, 'Goodbye.' I think you have the wrong carrier on the stand here.
- Q You have been here. I think one witness testified that you were concerned about losing the business.
- A That couldn't possibly be true because the United States Government was begging us for airlift. This trip could have been cancelled on Monday and another trip operated on Thursday with no problem whatsoever." (Tr. 328-329).

As above indicated, a wrong may have been done to the innocent victims of the trust placed by their President in her husband and the subsequent larceny by the husband. However, Capitol acted in good faith in attempting to avoid a stranding and a compounding of that injury in a manner consistent with its views of its public service obligations and on the advice of experienced counsel as to how it could meet those obligations consistent with the applicable law and regulations governing its charges to the public.

The Bureau, by requesting a cease and desist order in connection with a nonrecurring and unusual circumstance made possible only by reason of the actions of the chartering organization's President and her husband, would attempt unnecessary punitive action against Capitol through the issuance of a cease and desist order as a remedy for private wrongs which were not, in fact or in legal effect, committed by Capitol.

No punitive sanction should be applied to Capitol for the acts of another over whom it had no control. The guilty party has confessed and has

[Tr. 551]

been convicted by a State court having appropriate criminal jurisdiction. He was indicted and convicted of larceny of money from the possession of the charterer.

In another State court proceeding arising out of the identical circumstances, an injunction action brought against Capitol by the New York Attorney General was dismissed, on the merits.

This case could indeed be deemed res judicata on the basis of the two New York cases. Capitol's actions, taken in good faith on the advice of experienced counsel, were in accord with the requirements of the Act, the Economic Regulations, its tariffs and the needs of the affected public. The action was taken at the request of the charter participants and to avoid stranding 183 innocent persons who had already suffered a loss and would otherwise have suffered extreme hardship.

The evidence in this proceeding does not sustain a conclusion that Capitol committed any violation, intentional or otherwise. The evidence does not even sustain a finding that the chartering organization paid the full charter price to the agent, and clearly shows that Capitol received less than the charter price from the agent and/or the chartering organization. Capitol did obtain a manifest but it could not be certified due to the disappearance of the President of the charterer, charter organizer, which also made it impossible to obtain the Statement of Supporting Information.

There was and is no question as to charterworthiness or as to the eligibility of charter participants. The evidence in this case supports the charterworthiness of the group and the eligibility of the participants, and there is no evidence to the contrary.

The failure to operate the flight in question under the circumstances, including the active intervention of law enforcement officials and wide notoriety, would have adversely affected the public, the entire transatlantic charter program and the industry in general, as well as Capitol.

[Tr. 552]

Since it is established, and the Bureau does not contend to the contrary, that neither Capitol itself nor any of its officers or employees received the monies involved, the Bureau's charge can be sustained only on the legal premise that by virtue of a pro forma limited agency contract, which specifically excluded the right or power to accept funds for or on behalf of Capitol, the funds given to the agent to be disbursed at the direction of the chartering organization, somehow became the funds of Capitol. Under the facts in this case, under general agency law and the law in particular of New York, such a contention cannot be sustained. Certainly, the determination of the legal status of parties arising out of and involving agency relationships should not be the subject of an enforcement proceeding.

II. GENERAL SUMMARY OF FACTS AND ARGUMENT^{1/}

Mrs. Sari Friedman was the President and charter organizer of the charterer, the New York State Teachers Study Group (NYSTSG). Her husband, Michael Friedman, was a travel agent doing business under the name of Nelson Travel Service prior to May 1965 and, subsequent thereto when he caused the business to be incorporated, President and majority stockholder of his agency business. (Friedman is hereinafter referred to variously as "Friedman" or "Nelson" and his wife as "Mrs. Friedman".) The circumstances and this proceeding arise out of the larceny by Friedman of a large sum of money collected by Mrs. Friedman from numerous members of NYSTSG for the purpose of participating in charter flights. Friedman had been requested by Mrs. Friedman, the President and charter organizer, to locate available equipment for a number of flights from qualified, authorized carriers. Mrs. Friedman had entrusted the funds to Mr. Friedman to be disbursed for various purposes ranging from the purchase of

^{1/} For the convenience of the Examiner we present in the form of Statement of Facts, Section III, of this brief, infra, a detailed evidentiary abstract of the record annotated to the transcript references.

[Tr. 553]

stationery and secretarial services to the obtaining of aircraft and the engaging of various air carriers, of which Capitol was only one.

Friedman was indicted for and convicted of larceny from the possession of the chartering organization of money owned by the charterer and divers unknown persons (presumably the charter participants) of \$165,562.07 (Appendix A).

On July 12, 1965, a plea of guilty to the charge of larceny was entered in the Supreme Court of New York and Mr. Friedman was committed to State Prison for a period of not less than four nor more than ten years (Appendix B).

In a subsequent proceeding against all the persons involved in the matter, brought by the New York Attorney General, the Supreme Court of New York not only dismissed the proceeding against Capitol on the merits, but also took the unusual step of awarding Capitol court costs to be recovered from the State of New York (Appendix C).

The petition for enforcement in this case is based upon the premise that Friedman, who was a travel agent, engaged primarily in representing NYSTSG, was the agent of Capitol for all purposes, because of the fact alone that Capitol executed a standard pro forma charter agency agreement limited to a single charter flight. The agency agreement (BOE-2) specifically excluded authority to collect money, as agent of Capitol, and the charterer had notice thereof.

The rationale of BOE is contrary to the indictment and conviction of Mr. Friedman, in that it rests upon the premise that the monies paid to Friedman, were paid to him as agent for Capitol. Under this rationale it must be found that the funds stolen were the monies of and in the possession of Capitol. As a matter of fact and law the funds were those of the charterer, as alleged in the indictment and as admitted in the guilty plea of Friedman.

The record in this case shows clearly that Friedman was selected as the intermediary by the charterer, that the monies were entrusted to Friedman by the charterer, and that the charterer intended such monies to remain those of

[Tr. 554]

NYSTSG until paid out on behalf of the NYSTSG and at the direction of the NYSTSG. The record thus establishes beyond any question that Friedman was the agent of NYSTSG for the disbursement of funds, and that the agreement with Capitol was primarily one for compensation and to provide necessary documentation.

In fact, this record shows that the charterer did not even give Friedman funds earmarked for the specified payments in accordance with the terms of the charter contract with Capitol, or pay Friedman in his alleged status as agent for Capitol, but rather as agent for NYSTSG.

The theory advanced by BOE would subject not only Capitol, but also all the other air carriers with whom Friedman dealt on behalf of the charterer, including at least Aeronaves Mexico, World, Trans International and British Eagle, to practically unlimited liability in unknown amounts for the acts of persons employed by the charterer and placed in a position of trust by the charterer which enabled the agent to misuse the charterer's money.

The ultimate issues here involve principles of general and local law which the Board should not endeavor to resolve. While the Board may order a carrier to comply with the provisions of the Act, it should not undertake questions of contract and agency liability as between private parties. This is a matter over which the ordinary courts of law are open to resolve. American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956).

This proceeding was brought against Capitol alone, despite the fact that Friedman apparently stood in the same relationship with all of the other carriers involved. The other carriers took the same position as Capitol; that the money stolen was the money of the charterer and that they had not been paid.

The only distinction between Capitol and the other carriers was that Capitol did not cancel its flight, which it contracted to operate, and did not leave the passengers stranded. On the advice of local experienced counsel with 36 years of civil law practice in New York and 20 years' practice before the

[Tr. 555]

Board, it took the position that it had not been paid in full as required by Section 295.14(e) of the Economic Regulations and its tariffs. At the urging of the charter participants it collected the deficit from them and operated the flight to avoid hardship on the charter participants, with the understanding, with the charter participants, that their only legal remedies were against Friedman and the NYSTSG.

It must be borne in mind that this action was taken under emergency conditions, shortly after Friedman and his wife disappeared, when hundreds of persons claimed to have seats on Capitol and there were unknown allegations as to possible liability. However, facts subsequently made known and developed on this record show that the advice of Capitol's experienced counsel was correct as a matter of law.

The events giving rise to this proceeding involve an isolated, unusual and nonrecurring event, of the type in which the Board has declined to take enforcement action in the past. Not only would such action not serve a useful purpose, but would be unjust under the peculiar circumstances here involved.

Therefore, the Examiner should find that Friedman was entrusted by the charterer to disburse funds on behalf of the charterer and that as a matter of law, he was the agent of the charterer for such purpose. This enforcement proceeding should be dismissed.

The whole setting in which the alleged violations occurred involved highly unusual circumstances brought about, not by action of Capitol, but rather independent actions of others. Capitol acted in good faith and while certain employees of Capitol may have been too trusting or even as the Bureau claims, negligent, the matters alleged to be violations do not relate to such negligence.

The fact of the matter is that the charterer, through its President, in possession of nearly a quarter of a million dollars obtained from members of the organization entrusted a third party with those funds. The third party,

[Tr. 556]

while a travel agent, was intimately associated with the charterer, not only in terms of being the husband of its President, but also intimately connected with the origination, solicitation and administration of the whole charter program of the charterer. While it was denied that Friedman had anything to do with the collection of the monies, the records were kept in his home. Friedman reproduced the solicitation material, obtained secretarial services on behalf of the charterer, purchased stationery on behalf of the charterer and in fact was charged with administering the disposition of all the funds of the charterer collected for charter flights and other activities. Friedman had control of the selection of carriers, and Capitol was forced to do business with him as a result of the control given him by the charterer.

Capitol's involvement with Friedman not only stemmed from the actions of the charterer but also were extremely limited. He sought out Capitol in trying to locate equipment and arranged one flight with Capitol of a number of charters which had been previously programmed, and were arranged with other carriers.

Under these circumstances, to impute the wrongdoing of Friedman, or the trust in him imposed by Mrs. Friedman, to Capitol would be a grave miscarriage of justice, and contrary to the common concepts of equity which imposes liability for loss, such as here concerned, upon those placing the wrongdoer in a position of trust. In this case the law clearly requires a determination that Friedman/Nelson was the agent of NYSTSG for the disbursement of funds, and that the loss must be borne by the charterer, whose representatives clearly regarded Nelson as agent of the charterer and imposed upon him the trust which he violated.

The operation of the flight without a certified manifest and without all of the documentation required to be furnished by the charterer was due to circumstances beyond the control of Capitol. While the lack of such documents might have justified, from a strictly technical viewpoint, the cancellation of

[Tr. 557]

the flight, such cancellation would have resulted in undue hardship upon the bona fide charter participants and have been adverse to the public interest. It is clear that the action taken by Capitol under these highly unusual circumstances was in the overall public interest and does not justify any enforcement action against Capitol.

III. STATEMENT OF FACTS - DESCRIPTION OF PARTIES AND TRANSACTIONS

A. The Charterer-NYSTSG

The New York State Teachers Study Group (Charterer or NYSTSG) is an organization of bona fide teachers in the State of New York formed to exchange information about study abroad (Tr. 16). It has been in existence for a substantial period of time and has chartered aircraft for trips abroad for a number of years (Tr. 17).

There is no evidence in the record which would indicate that the charterer was not in fact charterworthy or that any ineligible persons were permitted to participate in any flight. All the evidence adduced confirms that the organization was in fact charterworthy and that the participants in the flights were eligible therefor (Tr. 225 et seq.; 241 et seq.; 255 et seq.; 271 et seq.).

B. Mrs. Sari Friedman

The President of the NYSTSG in 1965 was Mrs. Sari Friedman, a teacher in the New York City School System since March 1957 and a member of NYSTSG since January 1963, who became President of the charterer in November 1964, at the time that the group became incorporated.^{2/} Prior to that time, she had been a member of the Flight Committee and Treasurer of the organization (Tr. 15-16, 82).

Mrs. Friedman was in charge of all arrangements for charter trips. She was responsible for having the solicitation materials printed (Tr. 65),

^{2/} As noted, infra, Mr. Friedman arranged for the incorporation of the organization through an attorney of his choice whom Mrs. Friedman never met.

[Tr. 558]

collected charges from the charter participants (Tr. 28), kept the record of payments by charter participants in a ledger book which was kept in her home to which all payments were sent (Tr. 21, 24, 32), deposited the funds in the name of the NYSTSG in a bank account on which all checks were drawn over her signature (Tr. 37-38, BOE-55-96), and signed the charter contracts (BOE-1; Tr. 68).

C. The 1965 Summer Charter Program

Mrs. Friedman testified that money was collected for "approximately five" charter flights programmed for the summer of 1965 (Tr. 18). A pre-flight notice of the charterer (BOE-27) and a solicitation flyer (BOE-110) and record of receipts (BOE-36-44) indicate that five roundtrip charters were scheduled: (1) a roundtrip "Brittania" charter to London departing on July 18 or 19, designated as Flight #4; (2) an Orient charter on an unspecified date, designated as Flight #5; (3) a roundtrip jet charter to London and Paris departing on July 2, designated as Flight #1; (4) a roundtrip jet charter to Paris and Rome departing on July 1, designated as Flights #2 and #3; and (5) a roundtrip jet charter to Paris and Rome on July 4, designated as Flights #6 and #7. The names of the carriers are not shown on the printed notice. BOE-26, a notice of boarding information issued by the charterer, correctly shows Capitol as the operator of the July 1, 1965, roundtrip flight to Paris and Rome, returning from Paris (designated by the charterer as Flights #2 and #3), the flight here at issue and the only flight contracted by Capitol.

Mrs. Friedman testified that she believed that the carriers involved were Capitol, World and British Eagle although she later learned that a deposit had been placed with Trans International (Tr. 34-35).

Mrs. Friedman testified that she signed the Capitol charter agreement (BOE-1, Tr. 68); that she had looked at it and saw that it was on the form of Capitol Airways and related to a flight to depart New York July 1, 1965 (Tr. 68);

[Tr. 559]

that she was unable to state whether or not she saw the notice, "Make all checks payable to Capitol Airways, Inc." (Tr. 69).

The Bureau has conceded that Capitol did not enter into any agreement for any flight other than on July 1, 1965 (Tr. 88-90).

D. The Handling of NYSTSG Funds

Money was collected by the organization from members for participation in various flights by transmittal to Mrs. Friedman at the personal residence of herself and husband, Mr. Friedman (Tr. 21). She there maintained a record of payments in a book with the assistance of two other members (Tr. 24, 32). Portions of this book were introduced in this record as BOE-28 through 54.

The portions of the ledger book introduced by the Bureau purport to represent collections for Flights #1, #2, #3, #6 and #7 and do not include collections for Flights #4 and #5. The entries are not in completely chronological order and show initial collections for participants ranging from November 27, 1964 to as late as June 22, 1965. According to Respondent's calculation from these exhibits, the collections, after refunds, cancellations and transfers between one flight and another, amounted to over \$155,000.

Mrs. Friedman testified that the ledger book was kept at all times, until turned over to the District Attorney in her home in the Bronx, New York City, which was also the home of her husband Mr. Friedman (Tr. 31-32). She testified that the ledger covered entries from about September or October 1964 through "probably" the end of June [1965] (Tr. 31-32).

Mrs. Friedman further testified that payments were deposited in the NYSTSG account in the Manufacturers Hanover Trust Company; that payments were made, in some cases, to tour agencies, such as UNITOURS, or directly to airlines, and to Nelson Group Travel for disbursement to airlines and for advertising and other administrative expenses (Tr. 37-38).

The Bureau introduced into evidence 42 checks designated as exhibits BOE-55 through BOE-96. The checks so introduced were numbered, with one

[Tr. 560]

exception, from "583" in the case of BOE-55 to "788" in the case of BOE-96. There were 153 other unexplained checks issued to Nelson out of the charterer's funds. All of the checks introduced as BOE-55-96 were issued to Nelson during the period between November 9, 1965 and May 19, 1966 and given to Michael Friedman by his wife (Tr. 43).

An analysis of notations on the checks from the NYSTSG to Nelson indicates that approximately \$2,800 was paid to Nelson with the intent that he apply that sum for brochures, secretarial and administrative expenses, \$40,000 for a trip to Mexico during the Easter holiday, approximately \$43,000 for a charter by World Airways, \$27,730 for a British Eagle charter and \$2,000 for 1966 charters. The balance of approximately \$127,000 according to notations, was to be applied by Nelson as follows: \$20,933.80 to the July 1 charter; \$25,278.80 to the July 2 charter; \$16,000 to the July 4 charter and the balance of \$65,213.40 for other summer 1965 charters. However, the last amount represented by six separate checks was not broken down between specific charters or otherwise allocated for specific flights. Mrs. Friedman was not able to point to any specific checks which would show that money was given to Nelson to pay Capitol in full for the July 1 flight.

The foregoing is based upon notations on the left front of checks "to list what the check was for and what it covered" (Tr. 43). Mrs. Friedman testified that she also issued "at least one" check to Capitol and "at least one" to British Eagle for summer 1965 flights. It was conceded that Capitol received a check for \$25,000 directly from the charterer, NYSTSG, that was applied to the July 1 flight. Mrs. Friedman testified that she made payments to World for Easter flights and other payments directly. Mrs. Friedman testified that the check made out to Capitol Airways was given to Mr. Friedman for transmittal to Capitol (Tr. 55); that she generally made payments for flights by carriers to Nelson to be disbursed by Friedman (Tr. 56).

[Tr. 561]

The checks of NYSTSG offered in evidence covered a whole variety of transactions, and the individual checks were made out to Nelson for a whole variety of purposes. For example, BOE-59 in the amount of \$1,690.72 was allegedly paid to Nelson for a deposit to Aeronaves for an Easter flight, brochures for an Orient trip and stamps and labels (Tr. 83). BOE-55 was paid to Nelson for brochures and stamps; BOE-56 was paid to Nelson for the purchase by NYSTSG of stationery, cards, letterheads, etc., purchased from Aladdin Associates (Tr. 83-84); BOE-60 and 62 for deposits on hotels in Mexico. Others include payments for "secretarial" expenses (BOE-75; BOE-89).

Mrs. Friedman testified that she funneled money from NYSTSG to Nelson to make payments on behalf of NYSTSG on various flights, for various trips and for various purposes (Tr. 85) and that she trusted Nelson to act for NYSTSG for various flights and various matters (Tr. 85). When various monies were turned over to Nelson for various flights, there was no designation as to how much should be paid for each trip (Tr. 86) and it was left to Nelson to allocate the monies on behalf of NYSTSG (Tr. 86-87).

E. Relationship Between Mrs. Friedman and Mr. Friedman/Nelson

Michael Friedman is the husband of Sari Friedman, President of NYSTSG. The Friedmans had been married for 19 years and there was, according to Mrs. Friedman, a close relationship between the couple (Tr. 72) both of whom resided in the home where the records of the NYSTSG were kept and to which payments were sent. In fact, when NYSTSG was incorporated it was arranged by Mr. Friedman (Tr. 71, 75, 126) through an attorney whom Mrs. Friedman, who became President of NYSTSG at the time, never met (Tr. 71, 75).

Mrs. Friedman testified that she spent most of her working time in connection with her duties as a teacher (Tr. 78); that she did not have sufficient time to negotiate with airlines (Tr. 78); that the problem was to find airlines which had aircraft available (Tr. 73); that she used her husband,

[Tr. 562]

President of Nelson Group Travel, because of his greater experience in that field (Tr. 73); that she had used her husband since early 1964 when he entered the travel agency business for all NYSTSG business (Tr. 73-74); that when she paid her husband she assumed that the monies would be paid to the proper parties (Tr. 76-77); that she relied upon him and never distrusted him (Tr. 77); that he acted as her agent in paying monies to various airlines (Tr. 77); that when airlines were contacted, this was done by Nelson (Tr. 79) and that she did not designate any airline (Tr. 79); that when a charter agreement was submitted, it was the result of work and services of Nelson on behalf of the charterer (Tr. 80); that for charter flights in 1965, the Study Group used solely the services of Nelson (Tr. 80); and that NYSTSG paid Nelson for various services (Tr. 81); that in having Nelson seek out various airlines, negotiate the pricing, etc., it was done on behalf of the charterer (Tr. 82).

Michael Friedman was the sole owner of Nelson Travel Service formed at the beginning of 1964 and the principal stockholder and President of Nelson Group Travel when it was incorporated (Tr. 93-94). The only charters he had arranged with Capitol prior to 1965 were three charters in 1964 to Europe for NYSTSG (Tr. 94). These were the only charters he arranged with any carrier prior to 1965 (Tr. 130). On such charters, Friedman arranged for the aircraft with the airline, filled out necessary CAB forms, helped the group director to set up the program of how he would receive money from the participants, prepared the manifest and all other necessary paperwork (Tr. 95).

Mr. Friedman testified that he arranged for a charter flight by Capitol Airways to be operated on July 1, 1965, for the NYSTSG, that his wife was in charge of arrangements for the Group, and that he entered into an agency agreement with Capitol for that one flight (Tr. 96, 99). He also testified that he arranged a flight with British Eagle, two with Trans International and one with World Airways (Tr. 129-130).

[Tr. 563]

F. Handling of Funds by Friedman

Friedman testified that the NYSTSG checks received from his wife were deposited in the accounts of Nelson Travel Service or Nelson Group Travel and commingled with other funds (Tr. 100, 132); that when Nelson paid a particular carrier, it was impossible to tell whose money was being applied (Tr. 132-133); that the checks received from NYSTSG were for full payments, partial payments in varying amounts and for varying purposes (Tr. 127, 132); that Nelson Group Travel Corp. was requested to use these funds for the purposes indicated on the checks (Tr. 127); that his wife trusted him to handle the money accordingly (Tr. 127); and that he agreed to handle the money accordingly (Tr. 128); that if a check were received by Nelson for a payment of a charter flight which was later canceled, Nelson Travel would have returned the money to NYSTSG (Tr. 128); that he and Nelson were in sole charge of how the money was paid out (Tr. 129).

Nelson testified that he advised his wife to make one check payable directly to Capitol and the others to Nelson (Tr. 135-136); that he paid Capitol the checks represented by BOE-98 and 99 for the July 1 flight, that he had also given Capitol a check (BOE-12) on which he stopped payment (Tr. 102-103); that he had transmitted to Capitol the check of NYSTSG for \$25,000 made out to Capitol; and that there were deposits on flights, other than for NYSTSG, which were to be applied to NYSTSG (Tr. 104; Cf Friedman at 131-134). He agreed that all that had been paid to Capitol was \$35,362 (Tr. 134).

Mr. Friedman testified that monies received from NYSTSG were applied to expenses of his business (Tr. 138) and that he deceived his wife who relied upon him in the operation of the charters (Tr. 138); that for this reason he was convicted of larceny; that he had pleaded guilty to grand larceny and is currently serving a sentence in State prison (Tr. 114); that he had altered a \$4,000 check to \$104,000 in connection with another transaction and is serving two years sentence for that crime (Tr. 148-149).

[Tr. 564]

G. The Charter and Agency Agreement

The charter agreement (BOE-1) with NYSTSG was signed and accepted by Capitol in late December 1964, at which time an agency agreement (BOE-2) for the July 1, 1965 flight was issued to Nelson (Tr. 162-163; 289). The Group had previously had charters with Capitol and it was understood that it had already solicited participants for and had collected deposits for the July 1 flight and that there was no need for Nelson to solicit the Group (Tr. 290-1). The charter contract was limited to a single flight at the price of \$52,331 and contained the prominent notation, "Make all checks payable to Capitol Airways, Inc." (BOE-1).

The agency agreement (BOE-2) was a standard form limiting the agent's authority to the July 1, 1965 flight, requiring the agent to represent as directed by the carrier and to abide by the regulations of the Board. Under the terms of the agency agreement the agent agrees not to accept funds as agent for the carrier and to assure that the charterer makes all funds payable to the carrier.

H. Actions By Capitol

The only payments received by Capitol on the July 1, 1965 flight, the only flight for which Capitol had contracted (Tr. 186), were two checks of Nelson in the amount of \$5,281 in January 1965 (BOE-99) and a check for \$25,000 of NYSTSG (Tr. 168). On March 5, 1965, Capitol advised Nelson that payment on the charter flight of \$20,932 due March 1, 1965, was delinquent (BOE-7). On March 31, Nelson was again advised that the payment was delinquent, noting that although payments from the Group were slow, attempt should be made to hasten payments (BOE-8). A further letter, reflecting telephone conversations, was sent on April 30, 1965 (BOE-10). On May 11, 1965, an acknowledgment of the receipt of a check for \$20,937.40 was made and extension of final payment was granted until June 1, 1965. However, payment was stopped on the latter

[Tr. 565]

check (BOE-11-13). Capitol was advised that the check had been drawn on the wrong account (Tr. 167, 177). On June 10, 1965, acknowledgment was made of the receipt of the \$25,000 check from NYSTSG, noting that final payment of \$16,864.80 was due and urging that the CAB forms be submitted as soon as possible (BOE-14).

While the payments were late, extension was granted with the approval of Capitol's home office (Tr. 173-174), but almost daily requests were made for final payment and for the CAB forms (Tr. 311). The Vice President - Finance, learned of the difficulties in collecting early in June, but was assured that payment was going to be made immediately (Tr. 323-324).

Capitol's New York sales manager only became concerned after June 20 when he heard that flights on other carriers had not been paid for (Tr. 175-176, 204) and when neither Friedman nor Mrs. Friedman could be found (Tr. 294). On the weekend of June 25, Capitol's Vice President received a call from counsel for another carrier, who advised that Mr. and Mrs. Friedman could not be found, seeking addresses of other members of NYSTSG, and who stated that that carrier was cancelling two flights for NYSTSG because it had not been paid in full (Tr. 325).

Capitol managed to obtain a manifest from Nelson's office (Tr. 177, 295) and a telegram was sent to each person on the manifest that the flight was in jeopardy due to nonpayment and that a meeting would be held on June 29 at which the addressee's attendance and that of officers of NYSTSG were requested (BOE-111). This meeting was held rather than cancelling the flight because of the impending hardship on the passengers (Tr. 325). The New York sales manager was instructed to contact Capitol's New York counsel and to act in accordance with his instructions (Tr. 326).

At this meeting, approximately 500 persons in lieu of the anticipated 180 persons appeared (Tr. 180, 245), as well as representatives of the office

[Tr. 566]

of The Attorney General of the State of New York (Tr. 193). At this crowded meeting on a hot, hectic night at which it was hard to hear anything and at which numerous people were talking and clamoring (Tr. 198-199, 210, 235, 247, 251, 264, 347), and at which repeated efforts to persuade persons from other flights by other carriers to leave were fruitless (Tr. 240-241; 253), counsel for Capitol explained the situation, informed the group that there was a serious problem involved as Capitol had not received full payment as required by its tariff, and that the easiest course would be to cancel the flight and refund the money paid, and that the airline wanted to do what was proper (Tr. 348, 249, 250, 274).

During the course of this discussion, there were numerous interruptions (Tr. 348-350, 264) and the group pleaded that the flight be operated and that they would make up the balance (Tr. 350). The representatives of the Office of The Attorney General of the State of New York did not object to the payment of the balance by members of the flight (Tr. 350).

Counsel testified that he was torn between the fact that cancellation would cause difficulties and bad publicity and that operation of the flight without collecting the balance would be a tariff violation of Section 295.14(c) of the Economic Regulations (Tr. 349-351).

At the request of the group, each member was permitted to pay a pro rata share of the deficit in payment (Tr. 265) and the flight was operated on schedule (Tr. 327).

The additional persons, were those presumably stranded as a result of cancellations by other carriers.

The uncontradicted evidence shows that Capitol was concerned primarily with compliance with the tariff requirements and reluctantly accepted the payments from the charter participants, in lieu of cancellation. As testified by BOE witness Geller:

[Tr. 567]

"Q By counsel for Capitol Do you recall me telling the people at the meeting that we were more concerned with the question of law and tariff compliance than we were with the question of the difference in money?

A You were very concerned that Capitol be protected and not do anything illegal. That seemed to be very much on your mind.

Q Yes, I said that that was much more important than the difference in the money, isn't that correct?

A Or the convenience, or anything else. That was your main concern.

Q Obviously.

A That's right." (Tr. 249)

* * * *

"Q By BOE counsel Could it have been a Capitol representative?

A Well, yes. First he didn't even want to take the checks because they weren't supposed to deal with us but through the group.

Q But they accepted your money directly nevertheless?

A That's right, because it had to be done immediately because the flight was there and--." (Tr. 255).

Capitol would not have suffered by the cancellation of the flight.

There was a shortage of equipment at the time and the military was actively seeking additional lift (Tr. 154, 329). Capitol acted out of a sense of public responsibility to the passengers, gave them an opportunity to cure the problem and secure the transportation (Tr. 329). It was more concerned with compliance than with the balance of \$16,000 (Tr. 348, 330).

The charter participants were clearly advised that if they paid the deficit, as they requested, that they would be limited to their remedies against Nelson and/or Friedman. At the time, they were also advised that their chances of recovery were remote (Tr. 349-350). However, by the time of hearing, substantial monies had been collected under assignment for the benefit of creditors (Tr. 215-216).

[Tr. 568]

IV. THE COMPLAINT IS BASED UPON THE FAULTY LEGAL PREMISE THAT
PAYMENT TO FRIEDMAN WAS PAYMENT TO CAPITOL

A. Statement of Applicable Law

The Bureau, which has the burden of proof, has not shown that Capitol has acted in any way in disregard of the Board's regulations or the provisions of the Act.

The essential gravamen of the Complaint depends on an assumption of law that Nelson received funds from the chartering organization "in the capacity of agent for Capitol". This is as a matter of law and fact erroneous under the circumstances here involved.

The Bureau's premise apparently turns on the assumption that the pro forma "agency" agreement between Capitol and Friedman placed Friedman well-nigh in the position of general agent of Capitol, authorized to receive funds for and in the stead of Capitol, and that payment to Friedman discharged the organization's financial responsibility to Capitol. But the relationship of the parties, one to the other, is not so easily determined by over-simplified nomenclature or semantics. In this case, it is clear that a relatively extensive charter program was planned by NYSTSG, primarily through its President, Mrs. Friedman, who relied upon her husband, Michael Friedman, for most of the details and administration. This was accomplished prior to Capitol's commitment to the one flight and prior to the agency agreement executed with Friedman. The so-called "agency" agreement is one primarily to cover the payment of allowable compensation under the Regulations and to insure necessary documentation. Friedman was not hired as agent by Capitol to solicit the charters. Friedman, on behalf of the NYSTSG, sought out Capitol among other carriers to find equipment for the program. The agency agreement is strictly limited and provides no basis for finding, by implication or otherwise, any power or authority by Friedman to accept payments for Capitol. The charter contract, signed by Mrs. Friedman, expressly, in large letters, provides that all checks must be made payable

[Tr. 569]

to Capitol. The evidence shows that NYSTSG, through Mrs. Friedman, its President, made Friedman its agent with substantial sums given to him commingled for a variety of purposes and to be disbursed by him at the direction of NYSTSG (Mrs. Friedman) or at his discretion on behalf of NYSTSG. The funds stolen by Friedman were the funds of the charterer, not the funds of Capitol, and they were received by Friedman as agent for the charterer and not as agent for Capitol. This is clear as a matter of fact and as a matter of established law. To whatever extent Capitol accepted checks from Friedman they were received from him as agent for the organization. The Bureau's premise, relying as it does upon the designation of Friedman as agent, is at war with both the common practices in the industry, with the facts in this case, and with the law applicable to the facts in this case.

Under general agency law, merely because parties have described a relationship as an "agency" does not mean that agency relationship results; the relationship is created by law. If the relation to which the parties agree satisfies the tests for agency, that is what it is. Law of Agency, Warren A. Seavey (1946), Section 3D.^{3/}

Agency is a consensual, fiduciary relation between two persons created by law by which one, the principal, has the right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal. Seavey, Section 3. NYSTSG controlled the disposition of the commingled funds entrusted to Friedman⁷.

Agency is intrinsically consensual, not necessarily contractual. Consideration is not essential; one acting for another at the others direction is

^{3/} Rather than citing numerous cases herein, reference will be made to the Seavey text hereinafter cited as "Seavey" which is one of the very recent texts on the Law of Agency (See Seavey, Preface). Mr. Seavey is an outstanding authority on agency and Reporter for the Restatement of Agency and numerous cases are cited in the text in support of the conclusions of law for which Seavey is cited herein.

[Tr. 570]

an agent although he receives nothing for so acting. A husband may be an agent for his wife even where he cannot contract with her. Seavey, 3A.

The "principal" is one who permits or directs another to act for his benefit and subject to his control and direction. The "agent" is one who has undertaken to act for another and to be controlled by the other in so acting. Seavey, 3B.

The right of the principal to direct what the agent shall do is basic. It is a violation of duty for the agent to act for his principal in a manner contrary to orders and he has a duty to obey all orders which are within his contractual undertaking. Seavey, 3E.

A general agent is one continuously employed to conduct a series of transactions. A special agent is one employed to conduct a single transaction or a small group of transactions. Seavey, Sec. 5. The distinction turns on continuity of service rather than the breadth of the agent's power. Seavey, Sec. 5A. The purpose of the distinction is to limit the principal's liability for unauthorized acts of special agents, while subjecting a principal to liability for acts of general agents which, although unauthorized, are those which such general agents usually perform.

It is not unlawful for an agent to act for both parties to a transaction if both know of the dual employment. If such agent is negligent or fraudulent, it is sometimes difficult to decide which one should bear the resulting loss. If he is in the general employment of one of the parties, it is inferred that his primary allegiance is to the general employer, and that the latter should bear any loss caused by the agent's conduct. Seavey, Sec. 12A.

There is nothing wrongful on the part of a debtor in making the agent of his creditor his agent to pay the debt, as where he gives the agent a note for the amount due with the creditor's agent agreeing to pay the debt. Seavey, Sec. 119A.

[Tr. 571]

In the cases in which the common agent of the buyer and seller embezzles the difference between the amount given him by the buyer and that which he gives the seller, the courts tend to throw the loss upon the buyer. Seavey, Sec. 119.

A person receiving money from another to be paid to a third, is normally the agent of the one giving him the money. When a person acts as agent of both parties, he may be an escrow holder, but he is not an escrow holder, but an agent, if one party can direct him how to deal with property. Seavey, Sec. 10D.

A person is not an agent for another in doing an act or conducting a transaction unless the other had the right to control and have it done for his benefit. Seavey, Sec. 11.

If one dealing with an agent learns or otherwise has notice of facts which should lead him to believe that the agent is not authorized to conduct a transaction, there is no longer apparent authority to conduct it. Seavey, Sec. 18. A person cannot bind a principal to a contract or conveyance because of apparent authority or inherent agency power, if he should know, has reason to know, or has been notified that the agent is not authorized to make it. Both apparent authority and inherent agency power have been created primarily to protect persons acting with circumspection and good faith. Seavey, Sec. 76.

Under the law of New York, where the charter contract and the agency agreement were made, and the situs of Friedman, the chartering organization, the transactions between Friedman and his wife, and the origin of the transportation, the law is even more restrictive as to the authority of an agent. Under New York law, the purpose of a written agency agreement is not to define the authority of the agent as between himself and the principal, but to evidence the authority of the agent to third parties with whom the agent deals. Keyes v. Metropolitan Trust Co., 1917, 220 N. Y. 237, 115 N.E. 455.

[Tr. 572]

In New York, the fact that a person may be the agent of one party does not prevent him from being the agent for the other party or both. Thus, in a recent case, Asher v. Herman, 1966, 267 N. Y. Supp. 2d 932, where an escrow agent who embezzled funds in a real estate transaction was the attorney, and therefore the agent of the vendors, the court rejected the contention that the vendors were responsible for the loss. In that case, the court dismissed the buyer's contention that the vendors, by agreeing to refund payments made in case they were unable to convey the property, became the guarantor of the escrow agent who was their attorney. The court found that vendors had nothing to refund to the purchaser because they had received nothing from the purchaser.

Similarly under New York law, a person may be agent or servant even though he receives no compensation from the principal or master and is paid by another. Barile v. Wright, 261 N.Y. 1; Callahan v. Munson Steamship Line, 126 N.Y.S. 538; Koetnitsky v. Mathews, 118 N.Y.S. 366, 367, Cf. 3 Am. Jur. 2d §255-256. An agent for one of the parties to a sale may legally make a contract with the other party to the transaction for compensation with the knowledge and consent of the party.

Nor is it essential that any actual contract exist or that compensation be expected by the agent or agreed by the parties as long as the relationship arises by the consent of principal and agent. Barile v. Wright, 256 N.Y. 1.

One dealing with an agent is bound to inquire as to the extent of his authority and has the burden of proof to establish such authority. When he knows that he is dealing with an agent with limited or circumscribed authority, he cannot hold the principal. He must acquaint himself with the strict extent of the agents' authority, and deal with the agent accordingly, as he is bound by the limited authority. Sponge Rubber Prod. Co. v. Purofied Down Prod. Corp. 119 N.Y.S. 2d 783; Ernst Iron Works v. Durolith Corp. 270 N.Y. 165;

[Tr. 573]

Quinlan v. Providence Washington Ins. Co. 133 N.Y. 356; In re Fichtner's Will, 96 N.Y.S. 2d 426.

Even where a written agency agreement is not required, a person who deals with an agent with notice that the authority is in writing, is bound to know the extent of the agent's authority even though not exhibited to him.

Schaffner v. New York Trust Co., 34 N.Y.S. 2d 537.

The Schaffner case, although not precisely on all fours, is dispositive of this matter. In that case, an agent was employed to sell books for an estate and to receive payment therefor. The buyer of certain of the books gave the agent a painting to sell with instructions to apply the proceeds to his indebtedness for the books. The agent fraudulently informed the buyer that he sold the painting, 50% for cash and 50% on credit, whereas he had sold the painting entirely for cash. The agent applied only 50% of the sale price to the indebtedness to the estate and subsequently became bankrupt. It was held that the buyer must stand the loss; that the agent was the agent of the buyer for the sale of the painting; that the mere instruction to the agent to apply the proceeds of the painting to his indebtedness was not enough since there was no evidence that the proceeds of the sale of the painting were actually applied by the agent on his books to the indebtedness to the estate by either debit to the estate or credit to the buyer.

Further, as to the buyer, with respect to other allegations, the court held that he knew or should have known that he was dealing with an agent, not a principal, with limited and prescribed authority and was bound, at his peril, to ascertain the limits of the power and authority of the agent, in his capacity as agent for the estate.

Here, there is no question but that the representative of the chartering group knew that Friedman/Nelson was an agent, and knew or should have known the extent of his powers as agent for Capitol including his lack of authority

[Tr. 574]

to accept payments as agent of the carrier, especially as the charterer was on specific notice that all payments on the behalf of the charterer were to be made payable to the carrier; that the agent did not, in fact, have authority to accept payment on behalf of the carrier; that payments were made to the agent to disburse on behalf of the charterer; that the charterer, in fact, regarded the agent to be acting in its behalf in this regard; that the charterer asserted control over how the agent should disburse funds; that neither the agent nor the charterer, in fact, considered payments to the agent to be payments to Capitol; and no evidence whatsoever that the agent did apply any funds, other than actual payments to Capitol, to the charter. Not even the charter organizer herself could point to specific payments to be applied to the Capitol charter. The agent conceded that Capitol had not been paid any monies in excess of \$35,362 applied to the charter.

B. Under Applicable Law The Facts Show That Friedman Was the Agent of NYSTSG So Constituted With Full Knowledge And By Intent of Its President.

Mrs. Friedman of course knew intimately her business relations for NYSTSG with Friedman, knew of the limited relationship of Friedman to Capitol, knew that she was disbursing funds of NYSTSG to Friedman to pay at her direction and as agent for NYSTSG; knew that the funds were not the property of Capitol or any other carrier until and unless actually paid in hand into the actual possession of the carrier.

There can be no doubt that Mrs. Friedman, as President of the charterer, selected Nelson to act as an intermediary, not only with regard to dealings with Capitol and other carriers, but also numerous other persons. The record shows that Mrs. Friedman paid Nelson nearly \$250,000 and that Mrs. Friedman in most cases directed the purposes for which the money was to be spent, which ranged through a wide variety of purposes, or left such payments to the discretion of the agent. Where there was no designation of the specific purpose for which the funds were to be spent, Mrs. Friedman relied on her

[Tr. 575]

husband to properly allocate the monies on behalf of NYSTSG. She in fact used him for all NYSTSG business. She employed him to reproduce solicitation materials, to buy stationery for NYSTSG, to pay hotel bills, to procure secretarial services as well as to find and negotiate with airlines with aircraft available to provide charter services. The fact that when she requested Nelson (Friedman) to arrange a charter trip, she did not designate any airline confirms the fact that Nelson (Friedman) was acting on behalf of NYSTSG rather than any air carrier. In fact Mrs. Friedman testified she considered Nelson her agent.

Mrs. Friedman undertook, while giving funds, including unallocated funds and funds for multiple purposes, to direct and control the manner and purposes for which the funds were to be expended, another essential element of an agency relationship. Clearly, this was beyond the control of Capitol or any other carrier. Obviously, until actually disbursed by Nelson (Friedman), Mrs. Friedman on behalf of NYSTSG had the power to change the direction or purpose for which the funds were to be expended. The fact that Nelson would have returned money received from NYSTSG to NYSTSG if a flight were cancelled (Tr. 128), clearly underscores the fact that he accepted and held money, not as agent of the carrier, but as of NYSTSG. Friedman had no authority to disburse the carrier's funds, but did have the authority to disburse funds for NYSTSG. Nelson's (Friedman's) duty to disburse the funds received from NYSTSG was to disburse them in the manner directed by NYSTSG. Nelson's employment for NYSTSG was much more general in scope than his employment by Capitol, or any other carrier.

On the other hand, Capitol did not select Nelson (Friedman) as an intermediary to conduct negotiations for NYSTSG. Nelson (Friedman) did not have the power to bind Capitol, a fact known to Mrs. Friedman who signed the charter contract. In addition, Mrs. Friedman had actual and legal notice that Nelson did not have authority to accept payments on behalf of Capitol. Capitol

[Tr. 576]

had no power to control funds of NYSTSG in possession of Nelson (Friedman) and did not attempt to direct or control any such funds. In fact, the dealings with Nelson by Capitol were, as shown by BOE-4-10, in the context of dealing with "his group" and expediting payments by charter participants of the group for which he was acting.

While Capitol signed an "agency" agreement with Nelson, in accordance with industry practice (See the recently reissued Part 208) and as in fact required by terms of interim certificates of supplemental air carriers, the legal effect thereof must be evaluated in the light of the facts and industry practice.

In charter operations, any person can be appointed as "agent" by a carrier. Except in circumstances here not present, where a carrier appoints an agent generally to seek charter business, the "agent" is selected by the charterer to perform the service of obtaining a carrier and negotiating a price, on behalf of an in the interest of the charterer, satisfactory to the charterer. This is inconsistent with and vitiates any agency relationship in this regard between the intermediary and the carrier, Seavey, supra. This practice is recognized by Section 295, which prohibits the payment of a commission to a travel agent if he receives compensation from the charterer for the same services.

The scope of the problem in this regard has been enhanced by the removal in the Transatlantic Charter Investigation, Docket 11908, et al., of the prohibitions against travel agents assisting in the formation of charter groups, handling the sale of air transportation to members of the group and engaging in the administration of charter flights. While Capitol concurs with the Board findings in the Board's decision in that case (October 8, 1963, p. 42) that the elimination of the restrictions on activities of travel agents will enable the further development of charter travel by organizations previously unable or unwilling to organize their own programs, the removal of the

[Tr. 577]

restriction which enables travel agents at the request of the chartering organization to perform extensive services on behalf of the chartering organization has intensified the problem here involved, where the agent selected by the charterer and with whom the carrier is forced to deal, not by choice but as a representative of the charterer, can have entrusted to him considerable sums of money belonging to the charter participants. The practical realities of the present proceeding could subject charter carriers to almost unlimited liability for actions of persons over which they have no control as to selection, qualifications or otherwise. In this particular instance, which is an extreme case involving a relationship between the President of the chartering organization and the travel agent, of husband and wife, to subject Capitol to liability is in effect to make the carrier a guarantor of every chartering organization as well as of the agent selected by the organization.

The fact that a carrier pays a commission to the intermediary does not make the intermediary an agent of the carrier. This is common in many lines of business. Thus, the fact that a real estate agent who assists a person to purchase property receives a commission from the vendor does not make the real estate agent the agent of the vendor. Shell Eastern Petroleum Products v. White, 68 F.2d 279 (1934).

On the specific facts here involved, it is clear that the NYSTSG employed Nelson (Friedman) to arrange for the trip in question and other trips and paid money to Nelson prior to the time of any agreement between Nelson and Capitol. The record shows that NYSTSG arranged the trip and collected deposits prior to the date that Capitol signed the charter agreement or the agency agreement with Nelson.

Despite the recitals of the form agreement there was no contemplation that Nelson would solicit the group on behalf of Capitol. He already had been employed by NYSTSG to arrange for transportation with whatever carriers were

[Tr. 578]

available. Under the facts here present, the consideration to be paid by Capitol was for securing and executing proper documentation. The "agency" agreement specifically precluded Nelson from accepting money on behalf of Capitol. In effect, the so-called "agency agreement" was a mere agreement to pay compensation to the agent of the charterer, a common industry policy.

While BOE would appear to argue that Capitol waived this provision by accepting payments from Nelson or was negligent in accepting such payments, in legal effect the Bureau is arguing that Nelson had apparent authority to accept payment on behalf of Capitol. This is legally faulty because the charterer had actual notice in the contract, not only that Nelson's authority was limited in that he did not have the power to execute a contract on behalf of Capitol, but also that he did not have the power to accept payments on behalf of Capitol. Under both general and especially New York law, where a party knows he is dealing with an agent, and especially where he knows the agent's authority is limited, he has a duty to determine the scope of the agent's authority. Here there was actual notice, the intermediary was in fact appointed by and the agent of the charterer, and with such a close and intimate relationship between the person empowered to act for the charterer and the intermediary, there cannot be imputed any lack of actual knowledge.

There is not a shred of evidence in the record that NYSTSG paid a single payment to Nelson in the belief or in reliance on the fact, that he received payment on behalf of Capitol. All the testimony is to the contrary, to the effect that payments were made to Nelson to pay to Capitol and others on behalf of NYSTSG.

The fact that payments by check of the travel agent were accepted not only in this instance but in accord with general practice in the industry, merely underscore the fact that in practically all charter arrangements of this type and particularly in this instance the travel agent is acting on behalf of, under

[Tr. 579]

appointment of, in a fiduciary relationship to, and therefore, as agent of, the charterer. The only checks accepted by Capitol were made out to Capitol. No checks were accepted which were made out to Nelson or Friedman as agent of Capitol.

Furthermore, the charterer signed and had a copy of the charter contract. Without imputing any dereliction, criminal or otherwise to Mrs. Friedman, there is no evidence that NYSTSG paid Nelson the amounts specified in the contract. The contract which was signed by Mrs. Friedman on November 6, 1964, called for a deposit of \$5,233.10 on signing. While such a check was received from Nelson and subsequently recalled, there is no record evidence of any such payment by NYSTSG to Nelson on or prior to that date. There is no record of any check in a similar amount on January 6, 1965, although there was a payment of \$5,281.00 to Nelson dated January 11, 1965, and a check in a similar amount from Nelson to Capitol at about the same time, (BOE-98) which was accepted as the deposit on the flight. There is no record of a payment of \$20,932.10 by NYSTSG to Nelson or Capitol on March 1, 1965, or May 1, 1965, as required by the contract, although there was a check for such amount from NYSTSG to Nelson in such amount on May 19, 1965, purportedly for "3 Capitol charters" (BOE-95) which would appear beyond credibility when the amount specified would cover only one partial payment on one flight alone, under the terms of the contract.

It is significant that there was a direct payment of \$25,000 from NYSTSG to Capitol, by an organization check to Capitol as payee, about June 1, 1965, when Capitol was dunning for the balance due.

In other words, there is a complete failure of proof that NYSTSG which signed the charter agreement and allegedly other charter agreements ever made payments to Nelson in accordance with the terms of the charter agreement. The course of dealing between husband and wife as evidenced in this record does not substantiate the fact that the NYSTSG ever paid Nelson sums in accordance with the terms of the contract in belief they were in fact payments to Capitol and

[Tr. 580]

there is no record evidence of the fact. Thus, even if Nelson were the agent of Capitol, there is no evidence that any payments were made to Nelson in such status or in accordance with the terms of the contract and specifically allocated to the contract. The evidence shows that NYSTSG paid Friedman amounts collected for a broad program of five flights, and to cover other expenses, as funds were paid by the individual participants, with Friedman selected as agent to disburse the funds for NYSTSG for all purposes.

It is clear that the burden of proof in this proceeding clearly rested on the Bureau. The Bureau has not even established a case, assuming its legal premise were correct. As noted, the records submitted do not show the entire course of dealing by NYSTSG or all the funds collected from charter participants, but only a portion thereof. The funds for all the various flights were commingled by NYSTSG so that it is impossible to isolate the funds received for any particular flight or flights and how the funds received for those flights were in fact disbursed. There are apparently a large number of checks on the account of NYSTSG which were not introduced in evidence. Some of the checks of NYSTSG were made out to Nelson Travel Service while others were made out to Nelson Group Travel Corp. No explanation of this difference is contained in the record. No checks of NYSTSG were made out to Nelson or Friedman as "agent for Capitol". The Bureau has not established beyond reasonable doubt that NYSTSG in fact made payments to Nelson with the purpose, intent and belief that they were payments to Capitol or that the complete Capitol charter cost was covered.

In summary as a matter of law and fact, the record in this proceeding shows beyond any question of doubt that Nelson was the agent of NYSTSG for the disbursement of funds. Under these circumstances the petition for enforcement should be dismissed for the basic legal and factual premise upon which it is based has not only not been proved, but has, in fact, been disproved.

[Tr. 581]

Capitol was required to collect the total charter price by Section 403 and Section 295.14(e), and did so -- no more. Therefore, the violation alleged in paragraphs 9 and 13 should be dismissed.

V. CAPITOL'S OPERATION OF THE CHARTER FLIGHT WITHOUT OBTAINING THE STATEMENT OF SUPPORTING INFORMATION WAS JUSTIFIED UNDER ALL CIRCUMSTANCES.

The record shows that Capitol made diligent efforts to obtain the Statement of Supporting Information. It repeatedly requested such forms from November 7, 1964 (BOE-3) through June 10, 1965 (BOE-14) and later (Tr. 311). The purpose of the forms is to provide documentation that the organization is charterworthy and that the requirements of Part 295 as to the activity of the agent and charterer were observed.

In this instance, the chartering organization had operated previous charter flights with Capitol and other carriers (Tr. 16-17) and had been determined to be charterworthy. The evidence of record confirms that the organization was in fact charterworthy and that the participants in the flight were bona fide members of the chartering organization and members of their immediate families. The failure to obtain the statement of supporting information did not result in any violation of Part 295.

The failure to obtain the statement was due to the disappearance of the agent and his wife, the charter organizer. It was impossible to locate any other officer of the chartering organization. Thus, the gravamen of the alleged violation is that in the face of the lack of these documents, Capitol should have cancelled the flight. This would be an unduly harsh interpretation and application of the Board's regulations, and adverse to the public interest, which does not favor the stranding of innocent persons and the imposition of hardship, always accompanying such situations. In fact, Section 295.14 contains provisions designed to alleviate the possibility of such events, and in the footnote thereto exhorts the carriers to make provision to avoid such hardship on the originating portions of flights as well as the return leg.

[Tr. 582]

This portion of the complaint is a contradiction of the rationale of the main gravamen of the complaint. In one instance, Capitol is charged with a violation because it was zealous in attempting to achieve compliance and in this aspect, for not actually achieving compliance.

It is obvious that the operation of the flight, in the circumstances here involved, without the statement of supporting information was fully justified and in the public interest and was done in the exercise of responsible, prudent judgment.

This charge merely underscores the fact that Capitol is the respondent in this proceeding because it undertook to provide the service to avoid hardship to members of the public and to ameliorate, at least to some degree, the situation. While the record is not entirely clear on this point, some or all the other carriers involved in flights for the NYSTSG apparently cancelled their flights for non-payment, although it appears that some payments had been made to them. Nelson was the agent of these carriers to no greater or less extent than he was for Capitol. In essence, other carriers apparently took the same position as Capitol on the impact of payments by NYSTSG to Nelson. Yet enforcement action was taken only against Capitol because it operated the flight, whereas apparently if it had in fact cancelled, this proceeding presumably would not have been instituted.

Under these special conditions, there was no public injury and greater public injury would have resulted if Capitol refused to operate the flight because of the lack of certification. In fact, there is no evidence whatsoever that any unqualified or ineligible persons participated on this flight.

VI. THIS PROCEEDING IS NOT SUITABLE FOR ENFORCEMENT ACTION

In addition to the nature of the legal, technical, and factual issues, the Board should not take enforcement action against Capitol in the circumstances here present.

[Tr. 583]

The circumstances involved, are highly unusual. They have not occurred in the past and unlikely to occur in the future. As such it does not represent a course of regular and frequent recurrent activity warranting enforcement action, American Shippers, Inc. v. Shulman, Inc., Order E-14886, February 1, 1960; Slick Airways, Inc. v. American Airlines, Order E-11747, August 30, 1957.

The parties responsible for the events are no longer in a position which could result in a recurrence; Mr. Friedman is in prison; Mr. Friedman, Mrs. Friedman and NYSTSG, all are enjoined from engaging in charter activities. Cf City of Brownsville, et al. v. Pan American, Order E-16543, March 21, 1961.

The basic issue, the responsibility of a carrier for acts of a travel agent appointed, selected, and placed in a position of trust, by the charterer, is a matter of law, which the Board has previously not resolved. It was a matter resolved by Capitol in good faith on the basis of advice of experienced counsel and in an effort to meet its responsibilities to the public with the least hardship; in circumstances of utter confusion where allegations were being made that Capitol had responsibility for other flights for which it had not contracted, and as later events showed were contracted to other carriers who undoubtedly also had signed "agency" agreements with Nelson. Under such circumstances, there is no justification for the imposition of a sanction in this case. Complaint of the Board of County Commissioners v. National Airlines, Inc., Order E-18030, February 15, 1962; Seaboard & Western Airlines, Inc. Enforcement Proceeding, Order E-17920, January 9, 1962. West Coast-Enforcement Proceeding Order E-22248, June 1, 1965.

The alleged acts involve interpretation of private agreements and are not sufficiently serious to require the Board's attention. It involves the Board in a nebulous area of interpretation of local State law far removed from its primary statutory duties (See Dissenting Opinions of Members Hector and Minetti, Pan American, Enforcement Proceeding, Order E-12791, July 15, 1958).

[Tr. 584]

While the reliance on advice of counsel is not a complete defense to a crime or violation of law, it is an element which must be considered in determining the good faith and intent of the party charged:

"While it is true that the advice of any attorney is not itself a defense to the crime of concealment of property, nevertheless, it is an element to be considered in determining the good faith of the defendant. In order that concealment of property of a bankrupt may be punished as a crime, it must be 'knowingly and fraudulently' concealed (11USCA sec 52 (n)). Indeed if he so acted without the advice of an attorney, he was entitled to an acquittal certainly with that advice he should have been acquitted." Hersh et al. v. United States, 68 F.2d 799, 806.

This is a material consideration since an enforcement proceeding, although not a criminal proceeding, has a punitive effect. Thus, Capitol's intent is a very essential element in determining whether a cease and desist order should issue.

Intent requires an awareness of wrongdoing. When conduct is based upon mistake of fact reasonable entertained, there can be no such awareness and therefore no culpability.

In the case of People ex rel Hegeman v. Corrigan, 195 N.Y. 1, 87 N.E. 792, it was stated by the Court of Appeals in New York at page 12 as follows:

"It is very apparent that the innocence or criminality of the intent in a particular act generally depends on the knowledge or belief of the actor at the time. An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the defendant prosecuted innocent, would be a good defense."^{4/}

A cease and desist order is akin to an injunction. Injunction does not issue to provide punishment for past deeds, its only end is protection against future misdeeds. Hearn Dept. Stores, Inc. v. Livingston, 124 N.Y. S.

^{4/} See also: People v. Fitzgerald, 156 N.Y. 253, 50 N.E. 846; People v. Werner, 174, N.Y. 132, 134, 66 N.E. 667, 8; People v. Flack, 125 N.Y. 324, 334, 339, 26 N.E. 267; Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215; Dennis v. United States, 341, U.S. 494, 500, 71 S.Ct. 857; Clark & Marshall, Grimes (5th) ed., sec. 38.

[Tr. 585]

2nd 552, modified 125 N.Y. S. 2nd, 187, 282 App. Div. 480; Miller v. Gallagher, 28 N.Y. S. 2nd 606, 176 Misc. 647. It is a drastic remedy and the party seeking same has burden of making out a strong case to warrant it. Childhood Interests v. Hardwood Toy Mfg. Corp., 64 N.Y. S. 2nd 808. It is an extraordinary remedy and must be exercised with great caution and only when the right to it has been clearly and convincingly demonstrated. Pelletier v. Transit-Mix Concrete Corp., 174 N.Y. S. 2nd 794, 11 Misc. 2nd 617; Jacob Goodman & Co. v. New York Tel. Co., 137 N.Y. S. 2nd 556, reversed in part and modified in part, 137 N.Y. S. 2nd 797, 285 App. Div. 404, 887 app. denied, 141 N.Y. S. 2nd 527, 285 App. Div. 943, affd. 128 N.E. 2nd 406, 309 N.Y. 258; Howard Johnson's Inc. v. Block, 155 N.Y. S. 2nd 594, 14 Misc. 2nd 157. It should not issue unless the injury is imminent. Electrolux Corp. v. Val Worth, 190 N.Y. S. 2nd 977, 6 N.Y. 2nd 556. It should be denied where the complained of acts are no longer being committed nor threatened. Fullerton v. Kennedy, 187 N.Y. S. 2nd 213, 19 Misc. 2nd 502. The injunction should not be issued merely because of possible future conduct--there must be an immediate threat and the probability of such acts to warrant the drastic remedy of injunction. Spatt v. Feenberg, 183 N.Y. S. 2nd 659, 18 Misc. 2nd 925.

The record in this case does not show any intentional or other violation by Capitol or any action by Capitol in defiance of the Act or the Board's regulations.

VII. CONCLUSION

The record herein shows that the unfortunate series of events which occurred were the result of acts by an agent of the charterer whose only relationship to Capitol was in such status, for which Capitol agreed to pay him a commission, a usual and normal arrangement in the charter field.


Capitol not only did not commit any intentional violation but acted to ameliorate the situation in accord with the advice of counsel. It should

[Tr. 586]

not be punished for providing the service to the beneficiaries of the contract which is had duly executed, nor should it be censured or otherwise for collecting its tariff price prior to departure as required by the Board's regulations.

Therefore, this proceeding should be dismissed.

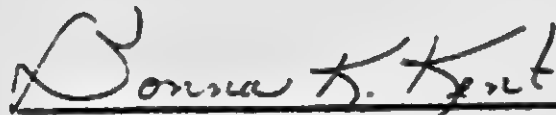
Respectfully submitted,


Theodore I. Seamon
Attorney for
Capitol Airways, Inc.

August 15, 1966

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copy of the foregoing Brief by mailing copy thereof, postage prepaid and properly addressed, to the Bureau of Enforcement.


Donna K. Kent

August 15, 1966

[Tr. 587]

Appendix A

SUPREME COURT
OF THE STATE OF NEW YORK
IN AND FOR THE COUNTY OF BRONX

The People of the State of New York

against

MICHAEL FRIEDMAN, also known as
MICHAEL S. FRIEDMAN, also known
as SAMUEL FRIEDMAN,

Defendant

The Grand Jury of the County of Bronx, by this indictment accuse defendant, Michael Friedman, also known as Michael S. Friedman, also known as Samuel Friedman, in the Crime of GRAND LARCENY IN THE FIRST DEGREE, committed as follows:

The said defendant in the County of Bronx, on or about and between the 6th day of November, 1964, and the 25th day of June, 1965, feloniously did take, obtain, withhold and steal from the possession of New York State Teachers Study Group, Inc., a corporation, certain property owned by said New York State Teachers Study Group., Inc., and divers persons whose names are unknown to the Grand Jury aforesaid, to wit, Lawful money of the United States of America, in the sum and of the value of \$165,562.07

with intent to deprive and defraud the said New York State Teachers Study Group., Inc., and said divers unknown persons, of said property, and of the use and benefit thereof, and to appropriate the same to the use of the said defendant.

ISIDORE DOLLINGER,

District Attorney.

SUPREME COURT
COUNTY OF BRONXClerk's Office July 1 19 66

THE PEOPLE OF THE STATE OF NEW YORK

against

MICHAEL FRIEDMAN

A/K/A MICHAEL S. FRIEDMAN

A/K as SAMUEL FRIEDMAN

Defendant

S. C. No. 1390 19 63Certificate of Disposition
(CONFESSION)

I DO CERTIFY that it appears from an examination of the Records on file in this office, that the above named defendant was indicted by the Grand Jury of the County of Bronx, on the 12th day of July 1965, charged with the crime of Grand Larceny in the 1st degree; that thereafter the said defendant was arraigned before Hon. Louis J. Capozzoli or Justice of Supreme Court on the 7th day of February 1966, and pleaded GUILTY to the crime of Grand Larceny in the 2nd Degree; and that thereafter on the 11th day of March, 1966; the said defendant was committed to State Prison by Mr. Justice Capozzoli for a term of not less than four nor more than ten years.

/s/ John J. Hanley

A true extract from the minutes.

Clerk.

(SEAL)

[Tr. 589]

Appendix C
Page 1 of 2

At a Special Term Part I of the Supreme
Court of the State of New York, held in
and for the County of New York, at the
Courthouse at Pearl and Centre Streets,
Borough of Manhattan, City and State of
New York on the 9th day of May, 1966.

P R E S E N T :

HON. GEORGE M. CARNEY

Justice.

-----X

In the Matter of the Application of
THE STATE OF NEW YORK by LOUIS J.
LEFKOWITZ, Attorney General of the State
of New York,

Petitioner,

ORDER & Judgment

Index No. 42210/65

for an order enjoining and restraining
MICHAEL FRIEDMAN, SARI FRIEDMAN, PATRICIA
FLANAGAN, NELSON GROUP TRAVEL COPR., (sic)
NEW YORK STATE TEACHERS STUDY GROUP, INC.,
CAPITOL AIRWAYS, INC. and DANIEL MITCHELL,

Respondents,

pursuant to Article 11 of the Business
Corporation Law and Section 63, sub-
division 12 of the Executive Law from

carrying on, conducting and transacting
their business in a persistently fraudulent
and illegal manner.

- - - - -x

The Attorney General having commenced this special proceeding pursuant to Article 11 of the Business Corporation Law and Section 63, subdivision 12 of the Executive Law against the above named respondents, returnable at Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, on October 28, 1965, and the respondent, Capitol Airways, Inc., by its attorney, George Berkowitz, having been made a cross-motion returnable February 7, 1966, for an order to dismiss these proceedings and the petition upon which it is based for legal insufficiency pursuant to Rule 3211 (a)(7) or, in the alternative, for summary judgment in favor of the respondent, Capitol Airways, Inc., dismissing the proceedings and petition pursuant to Rule 3212 of CPLR, and said proceedings having been adjourned from time to time and the final submission having been made to this Court on April 14, 1966, and the respondent, Capitol Airways, Inc., having appeared and been represented by its attorney, George Berkowitz, and the Attorney General having appeared and been represented by Assistant Attorney General

[Tr. 590]

Appendix C
Page 2 of 2

Stephen Mindell, and after due deliberation the Court having made a decision granting the cross motion of the respondent, Capitol Airways, Inc. to dismiss the proceedings and petition for legal insufficiency, and as it appears that there has been no showing whatsoever that the respondent, Capitol Airways, Inc. was in any wise connected with any fraud or illegal acts and practices,

NOW, on reading and filing the petitioner's notice of application dated October 15, 1965, the verified petition and affidavit of Assistant Attorney General Stephen Mindell, dated October 15, 1965, and his reply affidavit sworn to March 23, 1966 and exhibits annexed submitted in support of the proceedings; and the answer of the respondent Capitol Airways, Inc. dated December 16, 1965, the affidavits of Francis J. Roach, sworn to January 3 and January 21, 1966, the affidavit of George Berkowitz, sworn to March 29, 1966, the cross notice of motion to dismiss dated January 24, 1966, submitted in opposition to the Attorney General's proceedings and in support of the cross motion to dismiss and upon the decision of this Court granting the cross motion of respondent, Capitol Airways, Inc., to dismiss the proceedings,

NOW, on motion of George Berkowitz, attorney for the respondent, Capitol Airways, Inc., it is

ORDERED that the application of State of New York by Louis J. Lefkowitz, Attorney General of State of New York to enjoin and restrain Capital (sic) Airways Inc. from conducting their business practices in a fraudulent and illegal manner be and the same is hereby denied; and it is further

G.M.C.
J.S.C. ORDERED that the cross motion of Capitol Airways, Inc. to dismiss the petition against it be and the same is hereby granted on the merits and the proceeding is dismissed and severed as against Capitol Airways, Inc., and it is further

ADJUDGED that Capitol Airways Inc. of 535 5th Avenue, New York City recover from the petitioner, the State of New York by Louis Lefkowitz, Attorney General of the State of New York \$25 costs to be taxed by the Clerk of this Court.

G.M.C.
J.S.C. Filed
May 13, 1966
New York County Clerk's Office

G.M.C.
J. S. C.

James McGurrin, Clerk

Tr. 591

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[Tr. 591]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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CAPITOL AIRWAYS, INC. :

Enforcement Proceeding :

Docket 16370

BRIEF OF THE BUREAU OF ENFORCEMENT

TO

EXAMINER BARRON FREDRICKS

Monte Lazarus
Enforcement Attorney

Washington, D. C.
August 15, 1966

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[Tr. 593]

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CAPITOL AIRWAYS, INC. :

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I. Introduction

On July 1, 1965, Capitol Airways, Inc. (Capitol) began a charter flight from New York to Rome via Paris, with return to New York from Paris on September 3, 1965. The chartering organization was the New York State Teachers' Study Group, and the charter price was \$52,331.00 (BOE-1).

NYSTSG is made up of about 3000 teachers generally from the New York City area (Tr. 75). Although the primary purpose of this group is not totally clear, it is known that the members participated in and planned to participate in several charter flights in 1964 and 1965.

Capitol Airways is extensively engaged in passenger charter operations. To lessen the sales and administrative burden of its charter business, Capitol enters into agency agreements for specific charters with various travel agents. This practice is not unique with Capitol, as other air carriers do the same. For this NYSTSG flight, Capitol entered into an agency agreement with the Nelson Group Travel Corporation.

[Tr. 594]

(Nelson Travel). Nelson Travel had acted as agent on three Capitol charters for NYSTSG in the summer of 1964 (Tr. 94). Nelson Travel had also acted as agent for Capitol on two United Federation of Teachers charter flights in April 1965. Michael Friedman was principal stockholder and president of Nelson Travel, and signed the agency agreement with Capitol (BOE-2). ^{1/} Friedman's wife, Sari, was the president of NYSTSG, and signed the charter agreement with Capitol (BOE-2). Sari Friedman was actively involved in the organization of these flights before and after she became president of NYSTSG in November 1964 (Tr. 16). Her husband became a travel agent early in 1964 (Tr. 94).

The charter and agency agreements were signed by Daniel A. Mitchell, Jr., Capitol's District Sales Manager in New York (Tr. 158-159) on behalf of Capitol (BOE 1, 2). The agreements were cleared through Capitol's home office in Nashville, Tennessee (Tr. 160).

Under the terms of the agency agreement Capitol agreed to pay Nelson Travel a commission of five percent of the base tariff charges for the charter, and Nelson Travel agreed to represent the carrier with the charterer in the completion and transmission of charter documents. The standard form agreement also provided that:

"6. Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such

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^{1/} Prior to the end of 1964 (Tr. 94), Michael Friedman's travel agency was a sole proprietorship doing business under the name Nelson Travel Service. It is believed that the travel agency was incorporated on or about January 12, 1965. Nelson Travel will be used herein to designate either firm.

{Tr. 595]

funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name."

It is common practice with Capitol, and with other supplemental air carriers to allow agents to collect charter funds, deposit them to their personal or business accounts, and pay the carrier by personal or business account checks (Tr. 165-166). ^{2/} In conjunction with the normal and usual practice which was known to Capitol's representative Mitchell (Tr. 164, 165), and had been utilized on other charters for NYSTSG, checks were made out by the NYSTSG members and deposited in the study group account in the Hanover Trust Company (Tr. 37). Mrs. Friedman then made checks payable to Nelson Group Travel which she presented to her husband for forwarding to Capitol (Tr. 51, 52).

In 1965 NYSTSG collected at least \$158,000 ^{3/} from its members for all its planned charter flights. Of this total NYSTSG paid Nelson Travel \$105,000 for charters to be performed by Capitol and handled by Nelson Travel as agent.

^{2/} See also exhibits BOE-4, 6, 7, 8, 9, and 10, 106 and 107.

^{3/} The approximate figure of \$158,000 was reached by adding total adjusted payments by members to NYSTSG from exhibits BOE-28 through BOE-54. The approximate figure of \$105,000 was obtained by adding exhibits BOE-55 through BOE-96 (checks from NYSTSG to Nelson Travel) and excluding any check specifically marked for charters other than Capitol. Payments of administrative expenses were included.

[Tr. 596]

NYSTSG paid no less than \$26,214.00 to Nelson Travel for the specific charter of July 1, 1965, and Capitol also received \$25,000.00 directly from NYSTSG. Of the \$105,000.00 collected by Nelson Travel from NYSTSG, and the \$51,214.00 specifically earmarked for the July 1 flight (Br. Appendix A) Capitol claims to have received only \$10,466.20 from Nelson Travel, plus the \$25,000.00 from NYSTSG. Friedman neglected to turn over the remainder of the payments to Capitol, and also neglected to prepare or submit to Capitol the documentation required under Part 295 of the Board's Economic Regulations.

Almost from the beginning Friedman was delinquent in making payments on the charter. Nonetheless, Capitol continued to look to Friedman, as its agent, for the payments, and never sought to collect any of the money directly from NYSTSG (Tr. 169-171). Under the terms of the charter agreement the payments were broken down as follows: (1) 10% (\$5,233.10) on signing contract; (2) 10% (\$5,233.10) within 60 days after the signing of the contract; (3) 40% (\$20,932.40) on March 1, 1965; (4) balance of charges (\$20,932.40) on May 1, 1965 (BOE-1).

The contract was signed on November 6, 1964. At that time Friedman notified Capitol's sales representative, Walter Schofield, that he would not be able to send the initial deposit until December 10, 1964 (BOE-3). On December 29, 1964, Mitchell wrote to Friedman acknowledging receipt of Nelson Travel's deposit check of \$5,233.10, and reminding Friedman of the second 10% deposit (BOE-4).

[Tr. 597]

On January 4, 1965, Mitchell returned Friedman's initial deposit check upon Nelson Travel's request (BOE-5). On January 14, 1965, Mitchell acknowledged receipt of Friedman's check for \$5,281.00 which was to serve as the initial 10% deposit (BOE-6, 98). On March 5, 1965, Mitchell wrote to Friedman reminding him that \$20,932.40 was due on the NYSTSG charter as of March 1 (BOE-7). On March 31, 1965, Mitchell again reminded Friedman of the \$20,932.40 due, and asked Friedman to hasten payment (BOE-8). On April 2, 1965, in writing about the cancellation of another charter, Mitchell notified Friedman of the substantial amounts owed to Capitol, and asked whether he wanted to transfer the deposit from the cancelled charter to other charters (BOE-106). On April 30, 1965, Mitchell again reminded Friedman of the \$20,932.40 due, and referred to his "many telephone conversations regarding payment" (BOE-9). On May 11, 1965, Mitchell acknowledged receipt of the \$20,932.40, and noted that the date for "final payment" had been extended to June 1, 1965 (BOE-10). On May 27, 1965, Mitchell wrote Friedman that Capitol's home office had advised that payment had been stopped on the \$20,932.40 check. Mitchell asked for a certified check to replace the stopped check (BOE 11-13). On June 10, 1965, Mitchell acknowledged payment of \$25,000.00 from NYSTSG, and reminded Friedman of the final payment due of \$16,864.80, and the need of returning the completed C.A.B. forms for the charter (BOE-14). Friedman never paid the \$16,864.80 balance to Capitol, and it was this failure which led to Capitol demanding \$92.50 from each charter participant as a condition to operating the flight.

[Tr. 598]

Capitol's home office was aware of the difficulties in collecting payment at least as early as May or the beginning of June (Tr. 323). Nevertheless, Capitol continued to look to Friedman for payment of the balance even after the substantial \$25,000.00 payment was made by NYSTSG. That balance was not forthcoming from Friedman, and on June 28, 1965, Capitol's home office, for the first time, contacted its counsel in New York to find out what to do about the situation (Tr. 326).

Mitchell gave Capitol's office in Nashville a full report on the NYSTSG situation about eight or nine days prior to the flight (Tr. 296). Thereafter, on June 29, 1965 -- only two days prior to the departure date of the July 1 flight -- Capitol's employee Mitchell, who had represented Capitol in its dealings with Michael Friedman, decided to call a meeting of passengers (Tr. 178, 296). His superiors approved and the following telegram was sent to persons booked on the July 1 flight:

"YOUR DEPARTURE ON JULY 1 CAPITOL AIRWAYS FLT NY PAR
ROM RTN SEPT -- PAR NY IN JEOPARDY OF CANCELLATION
DUE NON PAYMENT FROM NYSTSG. MEETING BEING HELD
TUESDAY NIGHT SHELTON TOWERS HOTEL 525 LEXINGTON AVE
NYC 9 PM. REQUEST YOUR ATTENDANCE WITH ORGANIZATION
OFFICERS. CAPITOL AIRWAYS INC." (BOE-111)

At the meeting, Mitchell and counsel for Capitol informed a very large crowd of expectant passengers, many of whom believed they were on other Capitol flights, that there was but one charter contract, and Capitol had not been fully paid for that contract.

Mitchell stated that Capitol was \$16,864.80 short of the \$52,331.00 charter price. Near chaos resulted, not only because of

[Tr. 599]

the shortage on the July 1 flight, but also because several hundred people were expecting to go on other flights. It appears that the money collected by NYSTSG and paid to Nelson Travel for several proposed charters had been disposed of by Michael Friedman in various ways. ^{4/}

Daniel Mitchell (and perhaps counsel for Capitol) told the crowd that the July 1 flight could not leave without the "missing" \$16,864.80, which came to approximately \$92.50 per passenger. Most passengers were faced with virtually no choice. All had made extensive plans for the summer trip, and at least one had rented his house for the summer (Tr. 236). In the ensuing turmoil that night and the next day, \$92.50 was collected from each of the 183 passengers who ultimately went on the flight.

The flight departed on July 1. NYSTSG had collected and paid to Nelson Travel \$105,000.00 for this and other charters. The members of the July 1 flight had all paid in full to NYSTSG, (BOE-33, 36-44, 50) and NYSTSG had paid in full to Nelson Travel and directly to Capitol \$25,000.00. Additionally, as a result of the June 29 meeting, Capitol collected \$92.50 from each charter participant, or a total of \$16,927.50. Thus, on a flight contracted for under Capitol's proper tariff at \$52,331.00, Capitol and/or Nelson Travel collected \$69,258.50.

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^{4/} For his activities in connection with the flight Michael Friedman was convicted of grand larceny and is now serving a prison sentence.

[Tr. 600]

As a result of the actions of Capitol and its agents the Bureau of Enforcement docketed a complaint on July 30, 1965, alleging that Capitol had violated section 403(b) of the Federal Aviation Act of 1958 (Act) by collecting the \$92.50 from each passenger in excess of the full charter tariff amount already collected by Capitol and/or its agent. The complaint also alleged that Capitol had failed to obtain certain information required under Part 295 of the Board's Economic Regulations, prior to flight.

[Tr. 601]

II. Issues

The major issue in this case is whether Capitol overcharged the passengers who went on the July 1 flight, in violation of section 403 of the Federal Aviation Act of 1958 and Board regulations thereunder. The resolution of this question turns on whether Michael Friedman/Nelson Travel was the agent by actual, apparent or implied authority, of Capitol for collection of funds for the July 1, 1965, NYSTSG charter.

Other issues are whether Capitol failed to obtain, prior to flight, Sections A and B of Part II of a Statement of Supporting Information, and whether Capitol failed to obtain, prior to flight, a certified passenger manifest.

[Tr. 602]

III. Argument

A. General

The Bureau of Enforcement's position in this case is that Capitol and/or its agent Michael Friedman/Nelson Travel collected the full charter tariff price for the July 1 charter from the NYSTSG, and that after the agent failed to turn the full charter price over to Capitol the carrier demanded, collected and received an additional \$92.50 from each passenger. This action violated section 403(b) of the Act. ^{5/} This is grounded on the fundamental hornbook proposition that a principal is bound by the acts of his agent in the scope of his actual and/or apparent authority. In this case the agency relationship has clearly been established on the record, and the payments by NYSTSG to Friedman/Nelson Travel constituted payment to Capitol whether or not Capitol received the full amount from its agent.

The record herein demonstrates that Capitol entered into a "standard type" charter agency agreement on November 6, 1964, for the July 1 flight, with Michael Friedman/Nelson Travel, under which the agent was to receive a 5% commission for the agent acting on behalf of the carrier in dealing with the charterer, and in furnishing certain documentation regarding the flight (BOE-2).

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^{5/} "No air carrier . . . shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs . . ."

[Tr. 603]

It was and is a general practice in the air carrier industry to allow agents under charter agency agreements to collect charter funds in their own name. It was and is a general practice in the air carrier industry to allow agents under charter agency agreements to pay the carrier out of their personal or business accounts for charter transportation of groups. Capitol follows this general practice, and specifically followed the practice with regard to the July 1 NYSTSG charter (Tr. 164-165). The record also shows that Capitol allowed Friedman/Nelson Travel to disregard clause 6 ^{6/} of the charter agency agreement by permitting the agent to receive from NYSTSG and remit to Capitol in the agent's name the funds for the July 1 charter; and that Capitol received, without protest, funds for the July 1 NYSTSG charter which were remitted to it in the form of checks on the account of Nelson Travel (BOE-4, 6-10, 106, 107).

Capitol looked to Nelson Travel for remittance of all funds for the July 1 NYSTSG charter (Tr. 112) and Capitol never contacted, or urged Friedman/Nelson to contact NYSTSG to require charter payments to be made in the name of the carrier rather than its agent (Tr. 168, 171). Under these circumstances it is clear enough that Capitol entered into an agency arrangement with Friedman/Nelson Travel, and

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6/ "6. Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name."

[Tr. 604]

that until the meeting two nights before departure date Capitol regarded Friedman/Nelson Travel as its agent for collection of payments. Capitol cannot now be permitted to disclaim responsibility for the actions of its agent who failed to turn all the NYSTSG payments over to the carrier. By doing so Capitol has not only violated section 403(b) of the Act, but has injured the charter participants to the tune of \$92.50 for each passenger. In some families this ran to several hundred dollars (Tr. 227, 243).

1. Actual Authority

There is no doubt that Michael Friedman/Nelson Travel was a true agent, by contract, of Capitol for the July 1 charter (BOE-2). The controversy concerns the extent of the agent's authority. In its answer to the complaint in this case, Capitol contends that Friedman/Nelson was a limited agent authorized only to act ". . . for Respondent in a limited capacity, as aforesaid, [not explained] in accordance with the Board's regulations and to insure submission of supporting information and necessary documentation. . . ."

Capitol takes the untenable position that it should not be bound by a clause of the standard agency agreement with Nelson, ^{7/} but that NYSTSG should be bound by a single, unnoticed, eight-word line at the end of the charter contract. ^{8/} But, the case does not

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^{7/} See pp. 1-2 of Capitol's Answer.

^{8/} At the bottom of the charter contract (BOE-1) are the words "Make All Checks Payable to Capitol Airways, Inc." Mrs. Friedman (NYSTSG) stated that she never saw this statement (Tr. 69).

[Tr. 605]

turn upon this one-sided view. The crux of the problem is the way Capitol dealt with Friedman/Nelson Travel respecting clause 6 of the agency contract on payments for the NYSTSG charter. And the manner in which Capitol was willing to accept payments through Friedman/Nelson Travel leaves no doubt of Capitol's treatment of Friedman/Nelson Travel as its agent for the purpose of collecting money from NYSTSG. Any argument otherwise is flatly contradicted by the facts set forth in this record.

2. Apparent Authority

Undeniably, Capitol allowed Nelson Travel to ignore clause 6 by allowing the agent to collect the charter funds in his own name and pay Capitol by Nelson Travel checks. This is proven by the following facts: (1) NYSTSG paid charter funds to Nelson Travel (Appendix A); (2) Nelson Travel paid Capitol by Nelson checks (BOE-12, 98, 99); (3) Capitol consistently looked to Nelson Travel for remittance of charter funds in Nelson Travel's name (BOE-4, 6-10, 106, 107; Tr. 165-166, 174-176, 294, 310-311); and (4) Michael Friedman stated that he regularly paid Capitol from Nelson Travel accounts for charters (Tr. 101-102, 112-113).

If Capitol wanted to enforce clause 6, it merely needed to return the Nelson Travel checks and demand that NYSTSG pay directly in Capitol's name. Capitol never, in any way, put NYSTSG on notice that the group's practice of paying Nelson Travel was improper. As a matter of fact, there was no direct communication at all between Capitol and NYSTSG/Mrs. Friedman (Tr. 168, 171), even though the carrier's home office was aware of the delinquent payment situation (Tr. 308, 310, 323-324).

These facts alone are enough to prove that Capitol's manifestations to NYSTSG were such that Nelson Travel was clothed with apparent authority to collect funds in its own name. 2/ Not

 2/ Lind v. Schenley Industries, Inc. 278 F. 2d 79, 85 (C.A. 3, 1960 applying N.Y. law), cert. denied, 364 U.S. 835 (1960); Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co. 260 N.Y. 84 183 N.E. 73, 75 (Ct. App. 1932); Bronson's Executor v. Chappell, 79 U.S. 681, 683 (1870). See also Restatement (Second), Agency §§8, 27, (1958). The majority of cases cited herein to support the agency argument are from the courts of the State of New York since under any theory of conflicts of laws, New York precedent would apply.

[Tr. 606]

only active manifestations can prove apparent authority, but also simple acquiescence in Nelson Travel's collection and remittance practices can support such authority. ^{10/}

Capitol's approval of Nelson Travel's collections is neither an isolated instance nor a freak occurrence. Agent collection and payment for air carrier charters is the practice of Capitol and the industry (Tr. 163-167, also 55-56, 70, 112-113). ^{11/} Capitol engaged in the custom or usage of the industry; placed Nelson Travel in the position of collection agent, as is the practice of the carrier and the industry; and allowed NYSTSG/Mrs. Friedman to believe Michael Friedman/Nelson Travel had actual authority to collect in its name. These acts and omissions, customary to the industry, also are enough to prove that Nelson Travel had apparent authority to bind Capitol by its collections. ^{12/} The record shows that Mrs. Friedman acted in the belief that Nelson Travel was Capitol's agent for

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^{10/} Hoiden v. Kohout, 12 Ill. App. 2d 161, 138 N.E. 2d 852, 854 (App. Ct. 1956); Scott v. Continental Assurance Co., 167 Ohio St. 515, 150 N.E. 2d 38, 41 (1958). See also Restatement (Second), Agency § 43 (1958).

^{11/} Exhibits BOE-15 and 16 are Capitol deposit slips which show deposits of four agents' checks besides Nelson Travel. The notation "agent" after a charter group's name on the deposit slips indicates that the check received by Capitol was an agent's check (Tr. 163-164).

^{12/} Masuda v. Kawasaki Dockyard Company, 328 F. 2d 662, 665 (C.A. 2, 1964); Lind v. Schenley Industries, Inc., 278 F. 2d 79, 85-86 (C.A. 3, 1960 applying N.Y. law), cert. denied, 364 U.S. 835 (1960); Hoiden v. Kohout, 12 Ill. App. 161, 138 N.E. 2d 852, 853-856 (App. Ct. 1956); Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co., 260 N.Y. 84, 183 N.E. 73, 74-75 (Ct. App. 1932).

[Tr. 607]

collection, and that Mrs. Friedman was unaware that her husband was not turning the NYSTSG payments over to Capitol (Tr. 70, 138). The record shows that Capitol continually extended the time for Friedman to make payments on the NYSTSG July 1 flight, even though the Nashville office was aware of Friedman's delinquencies. (Tr. 173-175, 308-310; BOE-7, 8, 106, 107).

3. Ratification

Capitol received and retained the benefits of Friedman/Nelson's collection efforts. The carrier received, without the slightest hint of protest, the checks of Nelson Travel which transmitted the charter funds. Capitol affirmed these agent payments by letter (BOE-4, 6, 10, 106, 107) and only returned checks which did not or would not clear (BOE-5, 11, 12).

By making no protest, and by receiving and retaining the benefits of Nelson Travel's collections, Capitol ratified the agent's personal collections and remittances. ^{13/} While ratification lends authority ab initio to otherwise unauthorized acts, ^{14/} that is only of passing interest here.

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^{13/} Reusche v. California Pacific Title Insurance Co., 42 Cal. Rptr. 262 (1965); In Re Kroll's Estate, 8 Misc. 2d 133, 169 N.Y.S. 2d 495, 500-501 (Surr. Ct. 1957); Ramsay v. Miller, 202 N. Y. 72, 95 N.E. 35, 36-37 (Ct. App. 1911); Hyatt v. Clark, 118 N.Y. 563, 23 N.E. 891, 892-893 (Ct. App. 1890).

^{14/} See, e.g., Avery v. Bender, 119 Vt. 313, 126 A. 2d 99, 112 (1956 applying N.Y. law); Ramsay v. Miller, supra, note 16 at 36.

[Tr. 608]

The obvious point is that these ratifications were manifestations that Capitol was treating and would treat the Nelson Travel collection activities as authorized acts. This was certainly enough to encourage NYSTSG/Mrs. Friedman to believe that Michael Friedman was apparently authorized to collect and remit in the name of Nelson Travel. ^{15/} Consequently, although the charter contract on its face may have required NYSTSG to make payments directly to Capitol, the record is replete with evidence that Capitol and Friedman accepted payment to Nelson Travel, supra pp 11-12. This satisfies requirements of the New York cases on apparent authority. ^{16/}

4. Responsibility for Agents and the CAB

Holding a carrier responsible for the acts of its agent is not a novel question to the Board. ^{17/}

^{15/} For an interesting case with similar results, and certain analogous factual situations, see *Scott v. Continental Assurance Co.*, 167 Ohio St. 515, 150 N.E. 2d 38 (1958). See also, *Aero-Peninsular Compliance Case*, 24 C.A.B. 469, 507 (1957).

^{16/} See, e.g., *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 85 (C.A. 3, 1960 applying N.Y. law).

^{17/} There are numerous Board cases holding that air carriers and air freight forwarders, as principals, are bound by the acts of their agents, even though the agents may have exceeded the scope of authority the principals believed they were vesting in their agents. *Paramount Airlines, Inc., Supplemental Air Service Case* (Orders E-20263, 20264, October 23, 1963), mimeo initial decision, p. 34; *Shulman, Enforcement*, 30 C.A.B. 216, 231 (1959); *Aero-Peninsular Compliance Case*, supra, *American Air Transport, Noncertificated Ops.*, 11 C.A.B. 105, 112 (1950); *Standard A. L., Noncertificated Ops.*, 10 C.A.B. 486, 493-495 (1949); *IATA Traffic Conference Resolutions*, 10 C.A.B. 783, 791-792 (1949).

[Tr. 609]

Capitol cannot disclaim notice of the collection and payment activities of Nelson Travel. Capitol had actual notice (Tr. 308-310). Capitol also must recognize, as the courts have long recognized, that through its employee, Daniel Mitchell, the person constantly dealing with Nelson Travel, it had notice of the travel agent's activities. ^{18/} Moreover, Capitol cannot disclaim the acts of Mitchell who was later discharged for his dealings with Friedman. ^{19/} There is no evidence that Mitchell acted outside of the scope of his authority as Capitol's District Sales Manager.

Through any and all of the foregoing avenues of approach, Capitol gave Michael Friedman/Nelson Travel apparent authority to collect and remit charter funds in his own name. Capitol had actual and constructive notice of Nelson Travel's activities and troubles, and yet allowed NYSTSG/Mrs. Friedman to rely upon Nelson Travel's apparent authority. Capitol, therefore, must accept the consequences of Nelson Travel's acts, since "Regulatory statutes cannot be avoided

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^{18/} John Minder & Son v. L. D. Schreiber Co., 73 F Supp. 477, 478-479 (S.D. N.Y. 1947); Bonham v. Coe, 249 App. Div. 428, 292 N.Y.S. 423, 433 (1937), aff'd. 12 N.E. 2d 566 (1937); Hyatt v. Clark, 118 N.Y. 563, 23 N.E. 891, 893 (Ct. App. 1890); Cox v. Pearce, 112 N.Y. 637, 20 N.E. 566, 568 (Ct. App. 1889); Hoover, Assignee v. Wise, 91 U.S. 308, 310-311 (1875).

^{19/} Mitchell received personal checks from Friedman. It is a matter of dispute whether these were "gifts" or "loans" (Tr. 107-108). Mitchell and Mansfield, another Capitol employee were also to become stockholders in Gail Travel which Friedman proposed acquiring (Tr. 109). This in no way alters Friedman's status as agent of Capitol.

[Tr. 610]

by the interposing of third persons between carriers and the public." 20/

These consequences are that NYSTSG paid Nelson Travel for the July 1 charter (Appendix A) and this had the effect of paying Capitol for the charter. This is so because of the almost axiomatic rule of law that payment to an authorized or apparently authorized agent is payment to the principal. 21/

If any question remains as to the responsibility of Capitol for its agent's acts, the following quotation from an opinion of the Board should suffice.

"Actually, the responsibility of air carriers for the actions of their agents rests upon a broader foundation than an application of the principles of agency applied between private litigants. In those situations involving regulatory statutes, the principal is generally charged with the responsibility for the acts of its agents and employees, even in situations in which there would perhaps be no liability for damages in a private law suit. This principle is one of public policy, for in its absence the purpose of the regulatory statute would be defeated." 22/ [Citations omitted].

20/ American Air Transport, Noncertificated Ops., supra.

21/ Wilbanks v. James Talcott, Inc., 106 Ga. App. 770, 128 S.E. 2d 333, 336 (Ct. App. 1962); Gross v. Grimaldi, 64 N.J. Super. 457, 166 A. 2d 592, 596 (Super. Ct. 1960); Hoiden v. Kohout, 12 Ill. App. 161, 138 N.E. 2d 852 (App. Ct. 1956).

22/ Standard A. L., Noncertificated Operations, supra.

[Tr. 611]

Under the foregoing circumstances, any collection by Capitol from NYSTSG over the amount paid to that carrier and Nelson Travel was an overcharge in violation of section 403(b).

B...Overcharges...

When the question of apparent authority is resolved, the issue of overcharges is relatively simple. The charter contract (BOE-1) and tariff ^{23/} price of the July 1 charter was \$52,331.00. Capitol collected directly and constructively at least this amount from NYSTSG (Appendix A). Then, between June 29 and July 1, 1965, Capitol collected an additional \$92.50 for each of the 183 passengers who went on the July 1 flight. ^{24/}

Since Capitol had received the charter tariff price directly, and constructively through Nelson Travel, and since the carrier charged \$92.50 in addition to the tariff rate, it charged a ". . . different compensation for air transportation . . . than the rates . . . specified in its currently effective tariffs. . . ." This is in violation of section 403(b) of the Act and Board regulations thereunder.

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^{23/} Capitol Airways, Inc., Passenger Charter Tariff, C.A.B. No. 38, 5th Revised Page 13-A, effective April 30, 1965, cancelled April 6, 1966.

^{24/} See Capitol's Answer, filed September 7, 1965, at page 3. Also see the transcript at pages 196, 233, 234, 246-247, 265-266 and 277, and BOE-108.

[Tr. 612]

C. Failure to Receive Charter Documents

Capitol did not have Sections A or B of Part II of the Statement of Supporting Information prior to or after operating the July 1 charter. ^{25/} This is a violation of section 295.12 of the Economic Regulations. Capitol did not and does not have a certified passenger manifest for the July 1 charter. BOE 19-25 are pages of an uncertified manifest compiled by Capitol. Section 295.35 requires the carrier to have a manifest filed by the charterer prior to flight with a certification by the group representative attached. BOE 19-25 do not comply with section 295.35, since no such manifest was ever in existence. This, of course, is a violation of section 295.35 of the Economic Regulations.

D. Sanctions

1. Refund of Overcharge

Statements can be found to the effect that the Board has no power to grant reparations for wrongs committed by air carriers. ^{26/} This theory probably can be traced to the difference between the Interstate Commerce Act and the Federal Aviation Act of 1958. In specific terms, the Interstate Commerce Act provides for award of damages by the Commission. ^{27/} The Federal Aviation Act has no such provision.

^{25/} Answer of Capitol Airways, Inc., filed September 7, 1965, at page 3. Also, see the transcript at page 331.

^{26/} International Latex v. AAXICO, Enforcement, 33 C.A.B. 502, 503 (1961).

^{27/} 49 U.S.C. §16.

[Tr. 613]

There is, however, a difference between reparation, which the Board probably cannot grant, and a sanction to eliminate a continuing violation. Here Capitol has violated section 403(b) of the Act by overcharging each passenger \$92.50 on the July 1 charter flight. So long as Capitol retains those unlawful proceeds it continues to violate section 403(b). Therefore, the proper sanction here is an order directing Capitol to cease and desist from violating section 403(b) of the Act and directing Capitol to refund the \$92.50 collected from each charter passenger. ^{28/} This is neither impossible nor impractical, since Capitol has the names and addresses of each person (Tr. 295). Section 1002(c) of the Act gives the Board broad powers to compel compliance with the Act by issuing appropriate orders. ^{29/}

The decision of Capitol to charge the passengers \$92.50 was a mistake and a violation of the Act. Furthermore, even giving Capitol the benefit of acceptance of its version of most of the

^{28/} The Board has recognized that it can restore parties to status quo ante, and also has granted an exemption with a proviso for a refund of money to individual passengers. See Wings and Wheels Express, Inc., and American Shippers, Inc., Enforcement Proceeding, 33 C.A.B. 577, 579 (1961), where the Board spoke of restoration to status quo ante, but the facts of the case prevented compelling physical return of unobtainable items. Cf. Seaboard & Western Airlines, Exemption, 31 C.A.B. 997 (1960).

^{29/} 49 U.S.C. § 1482(c).

[Tr. 614]

facts, it is the least innocent of the parties. Capitol has the business acumen of a corporation, as compared to the inexperience of a group of teachers. Capitol should bear the loss caused by its misplaced trust, rather than the innocent teachers who were victimized by Capitol's agent, and by Capitol itself.

2. Charter Documents

A cease and desist order also should be issued to prevent Capitol from violating sections 295.12 and 295.35 of the Board's Economic Regulations. The carrier did not obtain Sections A and B of Part II of the Statement of Supporting Information or a certified passenger manifest, supra, p. 18. The Board has had the same trouble with Capitol in the past ^{30/} and a cease and desist order is appropriate in view of the carrier's lack of compliance disposition.

^{30/} In 1965 the Board collected a \$2,000 civil penalty from Capitol resulting, inter alia, from Capitol's failure to have or receive the charterer's statement and passenger manifest required by Part 295 for a series of flights. Another civil penalty case in 1964 for a similar offense resulted in a reprimand.

[Tr. 615]

CONCLUSION

On June 29, 1965, representatives of Capitol Airways, Inc., made a decision at a meeting of expectant charter passengers to collect \$92.50 in addition to the money already paid from each NYSTSG passenger as a prerequisite to operating the charter flight of July 1, 1965. That decision was wrong as a matter of law, and 183 innocent passengers have lost that amount of money.

Any relief would be barren, other than a refund of \$92.50 per passenger, and a cease and desist order requiring Capitol to assume responsibility for its agents' acts in the future. We believe that the public interest entrusted to the Board calls for affirmative relief, as well as injunctive relief. There is no question but that Michael Friedman was Capitol's agent, and public policy requires that this agent's larcenous conduct within the scope of his apparent authority should be redressed by his principal.

WHEREFORE, to implement these conclusions, the Examiner is requested to find that Capitol Airways, Inc. violated the provisions of the Act and Economic Regulations as set forth herein and to order each of the sanctions proposed.

Respectfully submitted,

Monte Lazarus
Monte Lazarus

Monte Lazarus
Enforcement Attorney

Washington, D. C.
August 15, 1966

[Tr. 616]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief on each party by mailing a copy to counsel of record in a properly addressed, franked envelope, certified mail.

Florence A. Sharer
Florence A. Sharer

Florence A. Sharer

Washington, D. C.
August 15, 1966

[Tr. 617]

APPENDIX A

CAPITOL AIRWAYS AND NEW YORK STATE TEACHERS' STUDY GROUP
CHARTER FLIGHT
NEW YORK/PARIS/ROME - JULY 1 - SEPTEMBER 3, 1965

		SOURCE	
		PAGE IN	BOE
		TRANS-	EX.
		SCRIPT	NOS.
<u>PAYMENT ANALYSIS</u>			
(1) Total Price of Charter Flight Per Charter Contract and Tariff	<u>\$52,331.00</u>		1
Payments of \$53,465.00 by Charter Participants to NYSTSG			33, 36-44, 50
(2) Included the Following Specific Charter Flight Payments by NYSTSG to Nelson Travel:	\$ 933.00 5,281.00* 5,000.00 5,000.00 <u>10,000.00</u>	134,164-165	69 70,98,6 84 87
Total	\$26,214.00		
There was One Charter Flight Payment by NYSTSG Directly to Capitol Airways	<u>25,000.00</u>		51
(3) These Payments Equal the Total Identifiable Receipts by Capitol and Nelson Travel	<u>\$ 51,214.00</u>		
Total Price of Charter (1)	\$52,331.00		
Subtract Total Identifiable Receipts (2)	<u>51,214.00</u>		
(4) Balance	<u>\$ 1,117.00**</u>		

* The relationship of Exhibits BOE-70, 98 and 6 and pages 134, 164-165 of the transcript of hearing show that the funds from NYSTSG check number 608 (BOE-70) ultimately were applied by Capitol to the July 1 charter.

** Pro rata allocation of \$1,117.00 balance by number of passengers = \$6.10 per passenger. Capitol Airways collected an additional \$92.50 per passenger. This means that even if the \$1,117.00 balance cannot be traced by specific check notations (as in (2) above), there was still an overcharge of \$86.40 (\$92.50 minus \$6.10). The \$1,117.00 balance can easily be covered by a \$5,000.00 check from NYSTSG to Nelson which is not in (2) above. See BOE-74 and compare it to BOE-99 and transcript pages 164-165. See also transcript at page 90.

[Tr. 618]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

INITIAL DECISION OF EXAMINER BARRON FREDRICKS

Served: **DEC 19 1966**

Upon:

George Berkowitz, 233 Broadway, New York, N. Y. 10007, for Capitol Airways, Inc.

Monte Lazarus, Bureau of Enforcement, Civil Aeronautics Board, Washington, D. C. 20428, for the Bureau of Enforcement.

This initial decision is rendered pursuant to the authority delegated to examiners under Rule 27 of the Rules of Practice in Economic Proceedings. It becomes effective as the final order of the Board 30 days after service thereof unless a petition for discretionary review is filed within 25 days after service thereof in accordance with Rule 28 or the Board issues an order within said 30-day period to review upon its own initiative. If a petition for discretionary review is timely filed or action to review is taken by the Board upon its own initiative, the effectiveness of this initial decision is stayed until further order of the Board.

[Tr. 619]

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UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

CAPITOL AIRWAYS, INC., ENFORCEMENT PROCEEDING

DOCKET 16370

Capitol Airways, Inc., is found to have violated § 403(b) of the Federal Aviation Act by collecting an overcharge for a charter flight and to have violated Economic Regulations Part 295 by failing to obtain supporting information and a certified passenger manifest for the flight, and is ordered to cease and desist from such violations.

Appearances:

George Berkowitz, Theodore I. Seamon, and Joseph D. Sullivan for
Capitol Airways, Inc.

Francis N. Pollack for Teacher Members of New York State Teachers
Study Group.

Eric J. Byrne and V. Michael Straus for Bureau of Enforcement.

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Order

INITIAL DECISION OF EXAMINER BARRON FREDRICKS

Preliminary Statement

Capitol Airways, Inc., contracted with New York State Teachers Study Group (sometimes called "NYSTSG" or "the study group") to operate, at a price of \$52,331, a pro rata charter flight to depart New York City on July 1, 1965, for Paris and Rome and to return September 3, 1965, from Rome to New York City. The complaint charges that Capitol, in its operation of this flight, 1) collected a greater compensation for air transportation than the fares specified in its tariffs and thereby violated § 403(b) of the Federal Aviation Act of 1958, as amended, ^{1/} failed to obtain either § A or § B of Part II of the Statement of Supporting Information required by § 295.12 of the Board's Economic Regulations or failed to retain those documents as required by § 249.10 of those regulations, and 3) failed to obtain a certified passenger manifest as required by § 295.35 of those regulations, or failed to retain the manifest as required by § 249.10. The prayer of the complaint is that the Board order Capitol to cease and desist from such violations.

Capitol filed an answer denying each violation alleged in the complaint and setting forth four affirmative defenses that purport to justify

^{1/} Section 403(b) of the Act in pertinent part provides:

"No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; * * *"

[Tr. 622]

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the respondent's conduct in the transactions to which the complaint is directed. A hearing was held in New York, N. Y., and briefs have been submitted to the examiner.

Capitol is a supplemental air carrier certificated under § 401(d)(3) of the Act for transatlantic charter service ^{2/} and domestic supplemental air transportation. ^{3/} Actively engaged since 1946 as a fixed base operator specializing in civil charter flights and substantially engaged in military airlift, ^{4/} Capitol's operations had developed by 1965 to a level at which it had some 40 aircraft, including DC-8 jet planes, employed more than 500 people, and carried, in addition to its domestic and military traffic, some 55,000 passengers on transatlantic charter flights.

In conducting transatlantic charter flights Capitol is subject to the provisions of Economic Regulations Part 295. These include the requirement of § 295.12 that, upon a charter flight date being reserved by the carrier or its agent, the carrier provide the prospective charterer with a copy of Part 295 and require the charterer and the travel agent involved to furnish the carrier, in due time for review before flight, the information required in §§ B and A, respectively, of Part II of the Statement of Supporting Information prescribed by Part 295, and the requirement of § 295.35 that the charterer, prior to the flight, file with the air carrier a certified passenger manifest. These requirements of

^{2/} Order E-20530, adopted on February 24, 1964.

^{3/} Order E-23350, adopted on March 11, 1966.

^{4/} Large Irregular Air Carrier Investigation, 28 C.A.B. 224 at pages 411-413 (1959); Capitol Airways, Interim Certificate, 37 C.A.B. 82 (1962).

Subpart A of Part 295, which relates to pro rata charters, are designed to enable the air carrier to determine that the charter conforms to the standards set by Part 295.

Contentions of the Parties

Capitol concedes that it received \$35,466.20 applicable to the charter price, that the travel agent with whom it had made a charter agency agreement did not transmit to the carrier the \$16,864.80 balance needed to make up the charter price, and that Capitol before operating the flight collected an additional \$92.50 from each charter participant to cover the full tariff price. The carrier maintains, however, that the travel agent represented it only to insure submission of supporting information and necessary documentation, was not its agent to solicit and develop traffic for the charter, and was not authorized to bind or act for the carrier except in the limited area of documentation. Capitol insists that to whatever extent funds were paid by NYSTSG to the travel agent, the latter was the agent of the charterer, which was at all times on notice by the charter contract that all checks should be made payable to Capitol. With respect to the charge of failure to obtain the agent's or the charterer's portion of the Statement of Supporting Information, Capitol submits that it exercised due diligence in its efforts to obtain the documents but was precluded from so doing by the agent's failure to perform his obligations and his absenting himself from his place of business prior to the date of flight. Finally, Capitol asserts that it did obtain and retain the passenger manifest for the charter flight.

[Tr. 624]

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In the Bureau's view Capitol is chargeable with funds received by the agent from the charterer, notwithstanding the agent's failure to transmit part of those funds, and the carrier's exaction of additional payments from the passengers just before the flight departure made it liable for collecting more than the tariff price. As to the documentation issues the Bureau contends that the agent's misconduct did not relieve Capitol of its obligation to obtain the pertinent parts of the Statement of Supporting Information and that the purported manifest introduced into the record is an uncertified manifest compiled by Capitol and not the certified manifest that Economic Regulations § 295.35 requires the charterer to file with the air carrier prior to the flight.

The History of the Charter

The question whether payments from the charterer to the agent were received in behalf of Capitol and were therefore in legal effect payments to Capitol is not answered solely by the terms of the charter agreement and the agency agreement but turns on the course of dealings between the charterer, the agent and the carrier.

Capitol's operation of the July 1 charter was in pursuance of an aircraft charter contract dated November 6, 1964, whereby the carrier agreed to provide a DC-8F aircraft for the use of not more than 183 passengers at a price of \$52,331 ^{5/} to be divided into payments of \$5,233.10

^{5/} The contract price was identical with the price set by Capitol Airways, Inc., Passenger Charter Tariff, C.A.B. No. 38, 5th Revised Page 13-A, effective April 30, 1965, cancelled April 6, 1966.

[Tr. 625]

on signing the contract, \$5,233.10 within 60 days after signing the contract, \$20,932.40 on March 1, 1965, and the balance, \$20,932.40, on May 1, 1965. The contract directed, at the foot of its first page, "Make All Checks Payable to Capitol Airways, Inc." and bore the signatures of Sari Friedman as president and director of the charterer NYSTSG, and of Daniel A. Mitchell, Jr., for Capitol.^{6/}

By a charter agency agreement also dated November 6, 1964, Capitol appointed Nelson Travel Service its agent to solicit and develop traffic for the NYSTSG July 1 charter. By the agreement the agent agreed to represent Capitol with the charterer as directed by Capitol or by the Civil Aeronautics Board in the completion and transmission to Capitol and/or the Board of all documents required for the charter service by the carrier or the Board and to abide by the Board's rules and regulations and Capitol agreed to pay the agent a 5-percent commission.^{7/}

The agency agreement included the provision—

"Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name."

^{6/} The contract had been prepared for the signature of I. H. Mansfield as director of sales for the carrier. Mitchell, who signed for the carrier, had been hired on November 16, 1964, as district sales manager in New York City.

^{7/} A 5-percent commission is the maximum allowed by Economic Regulations § 295.15 except that the commission may be raised to equal any higher commission paid to an agent for charter flights by a carrier certificated to render regular service on the same route.

[Tr. 626]

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The agreement was signed by Michael S. Friedman, "president", for the agent and by Mitchell for Capitol.

New York State Teachers Study Group, an association in which membership was open to any teacher in the State of New York, has engaged in assembling and making available to its members information relating to study abroad and the pay increments and differentials available on the basis of such study and, since 1961, in arranging charter flights for many teachers desiring to travel abroad for study or for recreational purposes. The study group was incorporated late in 1964. Mrs. Sari Friedman, who had been a teacher in the New York City School System since March 1957, joined the study group in January 1963 and, after serving as treasurer, became president in November 1964.

The study group, which had nearly 3,000 members, planned five charter flights to be operated in the summer of 1965. Solicitation of passengers, including the circulation of descriptive material among members of the group, was begun in the latter part of 1964. A notice issued by the study group in June 1965 described the flights as follows:

- #1 London-Paris 7/2-9/4 and Grand European Tour.
- #2 and #3 Paris and Rome 7/1-9/3.
- #4 London round trip 7/18-8/29.
- #5 Orient Charter and tours.
- #6 and #7 Paris and Rome 7/4-9/5.

The July 1 charter designated flights #2 and #3 was the only charter that Capitol contracted to operate for the study group in the summer of 1965.

Mrs. Friedman was active in administering the charter program. Because her time was largely occupied in performing her duties as a

teacher Mrs. Friedman did not negotiate directly with any airline but used the services of a travel agent to whom she entrusted selection of the airline for the flight. Passengers were directed to make installment payments by sending them to NYSTSG at 2260 Bronx Park East, Bronx, N.Y., which was Mrs. Friedman's personal residence. With the assistance of two other persons Mrs. Friedman did the paper work involved in collecting money for the flights. She maintained at her home a ledger in which payments for each flight were recorded. To insure against discrepancies in the ledger Mrs. Friedman checked the entries against a separate record on cards. Checks received from prospective passengers were deposited to the NYSTSG account at Manufacturers Hanover Trust Company, White Plains Road, in the Bronx. Charter payments were made in most instances to the agent but in some instances to the airline that would operate the charter flight.

Mrs. Friedman signed on November 6, 1964, the charter agreement with Capitol for the July 1, 1965, flight, confident that the study group would produce enough passengers. The ledger reflects a price of \$280 per passenger for those not carried beyond Paris and \$310 for those carried to Rome and shows receipts of \$25,480 for the Paris passengers and \$28,085 for the Rome passengers making up a total of \$53,565 ^{8/} collected from late November 1964 into June 1965.

^{8/} The receipts are net after adjustment for cancellations and transfers.

[Tr. 628]

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Nelson Travel Service, the travel agent appointed by Capitol's agreement of November 6, 1964, was the trade name under which Michael Friedman^{2/} began, earlier the same year, to conduct the business of arranging group travel to various areas and setting up charters with air carriers. In arranging a charter it was Friedman's function to negotiate with an air carrier able to provide the aircraft, fill out the forms necessary to comply with Civil Aeronautics Board requirements, help the group director to set up a program for collecting money from participants, prepare the passenger manifest for certification, and do any other necessary paper work. Friedman had arranged for NYSTSG three charter flights to Europe all operated by Capitol during the summer of 1964, these being the only charters negotiated by him and operated in the course of 1964.

Michael Friedman was the husband of Mrs. Sari Friedman. They resided together in the home to which members of the study group addressed their payments for charter trips and at which Mrs. Friedman maintained the study group's records. Their relationship was close and Friedman had been instrumental in arranging the incorporation of the study group through an attorney known to him but whom Mrs. Sari Friedman never met. Friedman was the only travel agent used in setting up the study group's charters in 1965. Mrs. Friedman made many payments to him out of study group funds in full confidence that the travel agent would apply them to proper purposes.

^{2/} Michael Friedman, who was in full personal control of the activities conducted under the name Nelson Travel Service and was controlling stockholder and president of Nelson Group Travel Corporation in the name of which the business was later conducted will from time to time be referred to as "Friedman" or "Nelson".

Capitol's dealings with Nelson were primarily through the carrier's district sales manager in New York City, Daniel Anthony Mitchell, Jr. The duties of the district sales manager were to support charter flights over the networks on which Capitol was operating, to run a sales office, and to supervise the personnel in that office. The sales office handled papers in connection with charters and received checks which it deposited into Capitol's account in a bank in New York City. Mitchell was employed as district sales manager during the period November 16, 1964 through December 8, 1965.

Mitchell's functions in dealing with Nelson were to line up flights to the Caribbean, to Europe, or to any area that Capitol could serve: to negotiate a contract; and to clear with Capitol's principal office at Nashville, Tenn., whether aircraft would be available for the proposed charter flight and whether a commitment could be made for the charter. On being advised that aircraft would be available Mitchell's office would issue a contract subject to availability on signing of the contract. It was Capitol's unvarying practice not to countersign a charter agreement until it had the agreement in hand, signed by the charterer and accompanied by a deposit.

The charter contract for the NYSTSG July 1, 1965, flight and the agency agreement with Nelson for the same flight were prepared, before Mitchell was employed, under date of November 6, 1964, and for counter-signature in Capitol's behalf by I. H. Mansfield, the director of sales. The deposit on the contract was not actually received by Capitol until

[Tr. 630]

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January 1965. Thereupon Mitchell countersigned both agreements as district sales manager for Capitol. Part I of the Statement of Supporting Information, prepared by Capitol, answers the question "On what date was the charter contract executed?" by stating "Issued - January 22, 1965."

The evidence, Capitol asserts, does not sustain a finding that the chartering organization paid the full charter price to the agent. On the contrary, there is clear proof of such payment. During the period November 9, 1964 through May 19, 1965, NYSTSG drew 42 checks payable to Nelson Travel Service or Nelson Group Travel Corporation for amounts aggregating \$217,873.88. All these checks were paid. Appendix 1 tabulates these checks and shows the purpose endorsed on the face of each check. Three of the checks (BOE-84, BOE-87, and BOE-91) totaling \$20,000 were marked for application to the July 1 charter to be operated by Capitol Airways. An additional \$37,146.40 was paid by six checks (BOE-66, BOE-69, BOE-70, BOE-73, BOE-74, and BOE-95) marked for application to Capitol Airways charters. Although the study group understood that its program of five charter flights included three to be operated by Capitol, the record shows that Capitol contracted to operate only one: the July 1 charter that the study group designated as flights #2 and #3. There were no other charters to be operated by Capitol and these six checks could be applied only to the July 1 charter. The study group had collected more than the full price of Capitol's July 1 charter and Friedman had received from the study group, in the form of checks allocated to or allocable to the July 1/September 3 commitment, a total of \$57,146.40.

Notwithstanding the amounts remitted by NYSTSG, Friedman, in dereliction of his responsibilities as a travel agent, failed to book with Capitol any charter flight for the summer of 1965 other than the flight scheduled to leave New York on July 1 and to return from Paris on September 3. Friedman transmitted to Capitol on account of this charter two checks of Nelson Travel Service, one dated January 11, 1965, for \$5,281 and the other dated February 8, 1965, for \$5,185.20 (exhibits BOE-98 and BOE-99) but made no other remittance to the carrier. In addition, Capitol received and applied to the July 1 charter a check for \$25,000 drawn by NYSTSG payable to the carrier which was deposited June 9, 1965, to the carrier's account with First National City Bank in New York (Tr. 49-58; BOE-18). Mrs. Sari Friedman wrote the \$25,000 check at Michael Friedman's suggestion and delivered it to him so that he might transmit it to Capitol. She had no personal contact with any employee of Capitol in relation to the July 1 charter flight but handled all arrangements through Nelson Travel Service.

Crediting Friedman with the \$10,466.20 that he remitted to Capitol by the two Nelson Travel Service checks and deducting this amount from the \$57,146.40 received from NYSTSG, there remained in Friedman's hands \$46,680.20 out of which to satisfy the \$16,864.80 charter price balance not yet paid into Capitol's account by mid-June 1965.

Capitol, if it had been disposed to insist upon observance of the schedule of payments set out in the charter agreement and the requirement that the study group remit directly to Capitol's order and not to

[Tr. 632]

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the travel agent, could have secured full payment by May 1, sixty days in advance of the departure date, or in default of such payment could have cancelled the charter and put its plane to some other profitable use. Instead of treating Friedman as the study group's agent and demanding payments on the dates provided, Capitol consistently looked to Friedman as its only means of obtaining payment and never attempted any direct communication with the study group. A series of letters evidences the carrier's contacts with Friedman and shows continuing effort by the carrier to obtain payment and continuing delay and evasion by Friedman.

A letter dated November 9, 1964, from Walter Schofield, a sales representative in Capitol's New York City office, transmitted to Friedman the charter contract and the agency agreement along with a copy of Economic Regulations Part 295 and the forms for the Statement of Supporting Information and the advance passenger manifest to be supplied by the agent and the charterer. Friedman endorsed on the foot of this letter a note to Schofield stating "I will not be able to send accompanying check until December 10th." Mitchell, who had begun his service November 16, 1964, as Capitol's district sales manager in New York, wrote Friedman under date of December 29 enclosing countersigned contracts and agency agreement, acknowledging receipt of the agency's check for \$5,233.10 to act as deposit on the flight, and reminding that a second 10-percent deposit would be due within 60 days of the date of the letter. Mitchell by letter dated January 4, 1965, returned the check "in accordance with your secretary's

request of this morning" and stated "it is our understanding that we will be receiving a check in the same amount directly from the charterer within a few days."

A letter dated January 14, 1965, from Mitchell to Friedman acknowledged the agency's check dated January 11, 1965, payable to Capitol Airways, Inc., for \$5,281 to serve as the first 10-percent deposit on the charter flight. Thus, the initial deposit was made more than two months after the date of the charter contract and by a check from the agent Friedman to the carrier, not from the charterer to the carrier. A second payment was made by an agency check dated February 8, 1965, for \$5,185.20 payable to Capitol Airways. Mitchell, by a letter dated March 5, 1965, reminded Friedman that a payment of \$20,932.40 was due on March 1, suggested that an oversight had led to the failure to remit, and asked that the check be sent by return mail. A Mitchell letter dated March 31, 1965, referred Friedman to the March 5 letter requesting payment and stated "It is realized that your payments from the group is not coming in as fast as you have anticipated however we suggest that you make some attempt to hasten payment and forward same to us." (Under-scoring supplied.) ^{10/}

Mitchell sent Friedman a letter dated April 2, 1965, advising him of the cancellation of a flight that had been scheduled for another charterer and asking whether his deposit of \$1,044.75 on the cancelled

^{10/} As appendix 1 shows, Friedman had received from the study group, prior to Mitchell's March 31, 1965 letter, a total of \$36,214 for payment to Capitol on the group's jet charters to Europe.

[Tr. 634]

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charter should be refunded or transferred to other charters that Friedman was holding. The letter transmitted a tabulation showing five charters (including the July 1 charter for NYSTSG) still scheduled, an aggregate of \$38,693.14 due Capitol as of April 2, and a net due Capitol of \$27,245.64 after crediting payments made on two other charters that had been cancelled.^{11/}

Mitchell, by a letter dated April 30, 1965, to Friedman, referred to his letters of March 5 and March 31 and his many telephone conversations regarding payment and asked immediate forwarding of a check for the \$20,932.40 which had been due since March 1. By letter dated May 11, 1965, to Friedman, Mitchell acknowledged receipt of an agency check for \$20,932.40 and emphasized that Capitol had extended the date for final payment to June 1, 1965. However, Mitchell subsequently advised Friedman by letter dated May 27, 1965—

"We have just been advised by our home office in Nashville, Tennessee that you have stopped payment on the check issued to us in the amount of \$20,932.40 numbered 406. ^{12/}

"Kindly contact me upon receipt of this letter so that we may arrange to have the check re-issued. It is my understanding from your secretary that the check was drawn from the wrong account and another will be forthcoming.

"In view of this, we would appreciate receiving a certified check to replace the above check."

Finally a letter dated June 10, 1965, from Mitchell to Friedman acknowledged "receipt of your group's certified check No. 792 in the amount of

^{11/} Exhibits BOE 106 and 107.

^{12/} First National City Bank's debit advice dated May 21, 1965, had been addressed to Capitol Airways at Berry Field, Nashville, Tennessee.

\$25,000 which will be applied toward payment on the above mentioned charter flight" (underscoring supplied) and stated that the final payment due on that date amounted to \$16,864.80. A postscript to this letter asked Friedman to return the completed CAB forms for the charter as soon as he could.

The letters show Capitol's complete acquiescence in Friedman's disregard of the schedule for payment and of the requirement that the payments be made by remittance from the charterer directly to the carrier and not through an agent. To recapitulate, Capitol actually received and deposited into its own account, as distinguished from Friedman's account, only three payments:

the agency check dated January 11, 1965, for \$	5,281.00
the agency check dated February 8, 1965, for	5,185.20
the study group's certified check (received	
in June 1965) for	<u>25,000.00</u>
Total	\$35,466.20

Mitchell's acquiescence in these deviations from the terms of the agreements is chargeable to Capitol. Mitchell was Capitol's responsible employee dealing, in the carrier's behalf, directly with Friedman. Three checks from the agent Friedman payable to Capitol (of which two were paid and the third encountered a stop order) were deposited in Capitol's bank account and the debit notice arising on the stop order was sent by the bank directly to Capitol's office at Nashville. Mitchell discussed his difficulties repeatedly with Mansfield, Capitol's director of sales at Nashville, and knowledge of the difficulties with Friedman and the study group charter was communicated to Capitol's vice president, finance, not later than early June.

[Tr. 636]

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The district sales manager Mitchell did not allow payments later than the times set by a charter agreement except in some instances when Capitol's home office extended the time for payment. In the case of the July 1 charter for the study group Mitchell orally sought and obtained from Mansfield, the director of sales at Nashville, approval of the extension of time. The carrier's reason for granting the extension was that Friedman had some deposits on Jamaica charter trips to be operated by Capitol and that Mansfield and Mitchell judged Friedman was a man of means whose cash was "a little tied up".

Mitchell, in order to collect the money and obtain a passenger manifest, engaged in many telephone conversations with Friedman and met him in various places in New York City, but without success. After learning, late in June, that Friedman was delinquent in paying amounts due other carriers Mitchell renewed his efforts every day. Friedman drew a check on his personal account which Mitchell tried to have certified, only to learn that the funds in Friedman's account were not sufficient. Friedman represented that funds being transferred from scheduled charters to Jamaica would be available but the amounts transferred proved far from enough to meet the payment due on the July 1 charter.

On the weekend before flight departure Mitchell tried to talk with Friedman both at his office and at his home and could not locate him anywhere. On Monday, June 28, Mitchell directed Walter Schofield, his salesman, to go to Friedman's office and wait there for him all day, if

necessary. Friedman could not be found but Schofield found and brought back two manifests which afforded Capitol its first information as to names and addresses of passengers on the study group charter flight. Mitchell then sent each passenger the following telegram:

"YOUR DEPARTURE ON JULY 1 CAPITOL AIRWAYS FLT NY PAR
ROM RTN SEPT — PAR NY IN JEOPARDY OF CANCELLATION
DUE NON PAYMENT FROM NYSTSG. MEETING BEING HELD
TUESDAY NIGHT SHELTON TOWERS HOTEL 525 LEXINGTON AVE
NYC 9 PM. REQUEST YOUR ATTENDANCE WITH ORGANIZATION
OFFICERS. CAPITOL AIRWAYS INC."

Capitol was represented at the meeting by Mitchell and by an attorney in New York City with whom Mitchell had consulted. The meeting was informed that Capitol was not free to operate the flight until it had received full payment, that the unpaid balance amounted to \$16,864.80, and that proration of this amount would approximate \$92.50 per passenger. During the night of the meeting and the course of the following day the balance claimed by the carrier was collected from the passengers and Capitol then operated the July 1 charter flight.

During the period when Mitchell was demanding the payments due on the July 1 charter, Friedman paid a total of \$5,000 to Mitchell. These payments were made by agency checks payable to Mitchell's order, the first four checks, each for \$500, being respectively dated February 1, February 10, March 5, and March 13, 1965, and the fifth, a certified check for \$3,000, being dated May 4, 1965. The checks dated February 10 and March 5 were inscribed "loan". The May 4 check, which was certified at Mitchell's request, was given to replace a check dated April 17, 1965, for \$3,000 payable to Mitchell and

[Tr. 638]

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marked "loan" which had not been paid.^{13/} Mitchell never repaid to Friedman any part of the \$5,000 thus received by him.

The showing of Friedman's advances totaling \$5,000 to Mitchell and the absence of any repayment stands uncontradicted. There is a conflict of testimony, however, as to the nature and the purpose of the advances. Friedman testified that these payments, although they were ostensibly loans and some of the checks were so marked, were in fact for services to be rendered: specifically, for Mitchell's help in assuring availability of aircraft for flights to the Caribbean area that Friedman hoped to arrange; in pursuance of an arrangement whereby Friedman would pay a commission of \$500 a flight to the people in Capitol's employ who helped him get a flight or a charter flight; to obtain Friedman's designation as agent at 5 percent commission for any charter flight negotiated directly between the charterer and Capitol without any intervening agent; and, finally, for leads to potential charterers who might arrange their flights through Friedman. Friedman testified that he did not expect any repayment. As to the benefits that Mitchell was expected to provide, Friedman testified he received no commission, notwithstanding the fact his agency was named in two charter agreements for groups other than NYSTSG.

Mitchell gave a different account of the payments he received. He began his employment with Capitol in November 1964 and could not earn

^{13/} The May 4 check was not delivered to Mitchell but was delivered directly to the bank to cover the \$3,000 check dated April 17, 1965, which had not been paid.

substantial commissions because Capitol had already booked all the charters it could operate until about May 1965. Mitchell did not ask for the loans initially; on the contrary, Friedman came to Mitchell's office in February 1965, learned that Mitchell had a personal financial problem, and volunteered to advance the money. Mitchell insisted that the advances were in the nature of loans to be repaid toward the end of June or in July 1965, when Mitchell expected he would be receiving a substantial commission. Mitchell denied that the checks were given him for affording Friedman any special benefits or preferential treatment and testified that the sales leads given Friedman were of the type that Capitol, in its ordinary procedure, gives to any agent in order to program a steady flow of charter flights. Mitchell, himself, had no authority or discretion as to making aircraft available on a particular date, this being a matter that had to be determined by Capitol's operations department. Mitchell's duties were to procure business on a sales level and subject to acceptance by the proper department in Capitol's organization.

Capitol, at the executive level, did not become actually aware until late August or early September 1965 that Mitchell had received advances of \$5,000 from Friedman. After learning of these transactions Capitol asked Mansfield, director of sales and immediate superior of Mitchell, to resign and he did resign December 8, 1965, and Capitol terminated Mitchell's services on the same date. Capitol took this action because it was convinced that Mitchell had exercised extremely poor judgment in performing his duties and that Mansfield exercised poor judgment in hiring Mitchell instead of someone more capable of doing the job of district sales manager.

[Tr. 640]

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Friedman's payment of \$5,000 to Mitchell, whether it was a loan or a gift to induce preferential treatment, does not alter the character of Mitchell's dealings on the July 1 charter, which were within the scope of his authority as Capitol's district sales manager and in which Capitol acquiesced.

Michael Friedman was indicted on July 12, 1965, by the Grand Jury of Bronx County, New York, for first degree grand larceny of some \$165,000 in money belonging to NYSTSG and other persons unknown to the Grand Jury. Friedman pleaded guilty to grand larceny in the second degree and was committed to State prison for a term of not less than 4 nor more than 10 years. In a proceeding in which the Attorney General of New York sought an order restraining Michael Friedman, Sari Friedman, Patricia Flanagan, Nelson Group Travel Corp., New York State Teachers Study Group, Capitol and Mitchell from conducting business in a persistently fraudulent and illegal manner Capitol moved for and obtained an order dismissing the proceeding as to Capitol on the ground that there was no showing that Capitol was in any respect connected with any fraud or illegal acts and practices. A restraining order was issued, however, against the study group and Sari Friedman.

Capitol submits that this enforcement proceeding rests on the theory that moneys paid to Friedman were moneys possessed by Capitol and that this rationale is destroyed by the conviction of Michael Friedman and the dismissal in the Attorney General's proceeding, which established that the moneys stolen by Friedman were the property of NYSTSG, the chartering

organization, and not the property of Capitol. The conviction rests on a guilty plea and involves no findings of fact or conclusions of law. The dismissal order was granted on the basis of legal insufficiency of the Attorney General's allegations as against the carrier and the lack of any showing that Capitol was connected with any fraud or illegal acts and practices. The order does not touch upon any violation of the Federal Aviation Act or of the Board's Regulations and does not adjudicate rights or liabilities between the study group, the travel agent and the carrier to an extent that limits the Board's power to adjudicate those rights and liabilities. It follows that the conviction and the dismissal order have no material bearing on the matters at issue in this enforcement proceeding.

Findings and Conclusions

The Overcharge Issue

Capitol, citing American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956), submits that this proceeding, because it turns on questions of contract and agency liability as between private parties, is inappropriate for resolution by the Board, and should be left to the courts. On the contrary, the issues in the present case are whether the carrier violated § 403(b) of the Act and the regulations of the Board that govern transatlantic charter service. These issues are as fully committed to the Board's jurisdiction as were the issues of unfair or deceptive practices or unfair methods of competition in the cited case, in which the Supreme Court said:

[Tr. 642]

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"Under § 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination. The Board has done that in the instant case. Considerations of the high standards required of common carriers in dealing with the public, convenience of the traveling public, speed and efficiency in air transport, and protection of reliance on a carrier's equipment are all criteria which the Board in its judgment may properly employ to determine whether the public interest justifies use of its powers under § 411."

The respondent insists that the study group, when it delivered a check payable to Nelson, paid its own agent, not Capitol's agent, and that Capitol is not chargeable with the receipt of any such payment. This contention finds apparent support in the charter contract's direction "Make All Checks Payable to Capitol Airways, Inc.", and it may be suggested that the study group was under a duty to inform itself of the provisions of the agency agreement that forbade acceptance of funds payable to Nelson's order and required the agent to obtain from the charterer funds payable to the carrier. This prima facie support is swept away, however, by unchallenged evidence that 1) it was common practice in the industry for carriers to accept charter payments in the form of checks drawn on the agent's account, 2) Capitol received checks drawn by Nelson, deposited them to its own account, and credited them as partial payment on the July 1 charter, and 3) Capitol never suggested to the study group that its remittances must be payable to Capitol's own order and never communicated directly with the study group,

but 4) granted an extension of time based on the judgment that Friedman would pay the charter price.^{14/}

The course of dealing between Capitol, Friedman and the study group operates, under the law of agency, to make Friedman's receipt of payments from the study group to be applied to the July 1 charter a constructive receipt by Capitol. The carrier repeatedly, and without protest, accepted and deposited Friedman's agency checks and credited the proceeds to the charter price. Restatement, Agency 2nd, states in § 43 titled "Acquiescence by Principal in Agent's Conduct",

"(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.

* * * * *

"Comment:

a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal indicates that the parties understood that such acts were authorized, * * *. If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as a ratification." (Underscoring supplied.)

The remittances from Friedman's agency account clearly conveyed to Capitol that the study group had paid the agent directly. Acceptance of

^{14/} Appendix 2 contains specific references to this evidence.

[Tr. 644]

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these remittances, coupled with extension of time for payments because the director of sales and the district sales manager believed Friedman was a man of means whose cash was a little tied up, amounts to an extension of credit to Friedman, an acceptance of him as Capitol's agent to collect the charter price from the study group, and an affirmance and ratification of his acts in the transaction. It follows that the study group's payments to Friedman for application to the July 1 charter were, in effect, payments to Capitol.

The relevant principles were stated and applied in Ramsay v. Miller, 202 N.Y. 72, 95 N.E. 35 (1911), in which the plaintiff Ramsay gave Ludwig, the manager of a branch office of the defendant stockbrokers, a series of orders to buy particular stocks followed by an order to sell all the stocks in his account. Ludwig disclosed that he had not bought the stocks Ramsay had ordered but had bought others of his own selection and that all the money in Ramsay's account was gone, but offered to readjust the matter and pay back Ramsay's money if the latter would keep quiet and take no action. Ramsay told Ludwig that he would wait for an adjustment, accepted some securities from Ludwig, and did not tell the defendant stockbrokers about the matter until some four months after the conversation with Ludwig. In holding that the question of ratification by Ramsay should have been given to the jury, a majority of the New York Court of Appeals said:

"* * * It is true that Ludwig was the defendants' agent, not that of the plaintiff. But this fact did not necessarily preclude the plaintiff from ratifying his acts. One may ratify the acts of another purporting to be made on his behalf whether that other is an agent exceeding his authority or no agent at

all. Huffcutt on Agency, § 30. This principle is recognized by this court in Hamlin v. Sears, 82 N. Y. 327, where Judge Earl said: 'The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text-writers upon the law of agency [citing authorities]. But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority.'

* * * * *

"* * * Ratification is based on assent, which may be either expressed or implied. If the principal adopts the acts of the agent, it is the same as if he had originally conferred authority upon the agent. While silence alone in many cases may be insufficient to constitute ratification, still it is competent evidence for the purpose. In this case there was proof that the plaintiff not only remained silent for some months, but that he agreed to remain silent, and that he received from Ludwig certain securities. If, in consideration of the agreement of Ludwig and his wife and of the securities turned over to him, he agreed to accept the purchases and sales ordered by Ludwig as authorized and to look to him for the payment of the losses thereon, then there was a ratification of Ludwig's acts."

In Bronson's Executor v. Chappell, 79 U.S. 681 (1870), the Supreme Court of the United States held that payments made to an agent who lacked authority to receive them were nevertheless chargeable to the principal in view of the principal's acquiescence in the agent's receipt of payments in a series of transactions. The court summarized the applicable law in the following words:

"Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition, or acquiescence, by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they

[Tr. 646]

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are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same."

Other decisions holding that payments to an agent not authorized to receive them were, in legal effect, payments to a principal who had acquiesced in a series of similar transactions include Hoiden v. Kohout, 12 Ill. App. 2d 161, 138 N.E. 2d 852 (App. Ct. 1956), Scott v. Continental Assurance Co., 167 Ohio St. 515, 150 N.E. 2d 38 (1958), and Cox v. Pearce, 112 N.Y. 637, 20 N.E. 566 (1889).

The following language of the court in Reusche v. California Pacific Title Insurance Co., 42 Cal. Rptr. 262 (1965), bears on the conclusion that the study group must be credited with the payments it made to Friedman:

"A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. The principal is liable although he is entirely innocent, although he has received no benefit from the transaction, and although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that, from the point of view of the third persons, the transaction seems regular on its face and the agent appears to be

acting in the ordinary course of the business confided to him (Rest. of the Law of Agency, §§ 261, 262; Rutherford v. Rideout Bank, 11 Cal. 2d 479, 483-484, 80 P. 2d 978, 117 A.L.R. 383; California Motor Express, Ltd. v. Chowchilla Union High School Dist., 202 Cal. App. 2d 314-315, 20 Cal. Rptr. 768). The law reasons that where one of two innocent parties must suffer, the loss should be accepted by the principal who is responsible for the selection of the agent and for the definition of his authority (Warshauer v. Bauer Construction Co., 179 Cal. App. 2d 44, 49-50, 3 Cal. Rptr. 570)."

By the charter agency agreement Capitol selected Friedman as its agent for the purposes stated in the agreement and its acquiescence in Friedman's conduct in accepting study group checks drawn to his order and depositing them in his agency account worked a redefinition of his authority that entitled the study group to believe that Friedman had full power to collect in behalf of the carrier.

The majority opinion in Lind v. Schenley Industries, Inc., 278 F. 2d 79 (C.A. 3, 1960), includes the following statement:

"'Actual authority' means, as the words connote, authority that the principal, expressly or implicitly, gave the agent. 'Apparent authority' arises when a principal acts in such a manner as to convey the impression to a third party that an agent has certain powers which he may or may not actually possess. 'Implied authority' has been variously defined. It has been held to be actual authority given implicitly by a principal to his agent. Another definition of 'implied authority' is that it is a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers. It is this concept that is called 'inherent authority' by the Restatement. In many cases the same facts will support a finding of 'inherent' or 'apparent agency'. Usually it is not necessary for a third party attempting to hold a principal to specify which type of authority he relies upon, general proof of agency being sufficient. Pacific Mut. Life Ins. Co. of California v. Barton, 5 Cir., 1931, 50 F. 2d 362, certiorari denied 1931, 284 U.S. 647, 52 S.Ct. 29, 76 L.Ed. 550."

[Tr. 648]

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It is unnecessary to conclude whether "apparent agency" or ratification better describes Capitol's relationship to Friedman resulting from the carrier's acquiescence in the agent's practice of collecting directly from the study group. Whichever concept is applied, the study group's payments to the agent were in legal effect payments to Capitol.

The contention that Friedman received no payment as agent for Capitol finds no support in Schaffner v. New York Trust Co., 34 N.Y.S. 2d 537 (1942), which involved facts that were significantly different. There an auction gallery (Anderson), which received certain rare books as agent to exhibit and sell them, effected a sale on credit approved by the owner of the books (the estate). The purchaser, Sickles, delivered three trade acceptances payable at intervals. Having paid the first of these on its due date, Sickles delivered to Anderson a painting to be sold for one-half cash and the balance on 60 days' credit and Anderson agreed to pay the second acceptance out of cash received on the sale of Sickles' painting and to pay the third acceptance out of the deferred balance on sale of the painting. The estate had no knowledge of the transactions between Anderson and Sickles. Thereafter Anderson sold the painting for cash and paid the second acceptance but represented to Sickles that the painting had been sold for one-half cash and the balance in 60 days. Nonpayment of the third acceptance and bankruptcy of Anderson was followed by litigation between the estate and Sickles, the latter claiming that Anderson's collection of the cash proceeds of the sale of the painting had effected payment of the acceptance. The court's reasoning in rejecting this contention is indicated by the following language used in the opinion:

[Tr. 649]

"[1] It is true Anderson was the estate's agent to receive payment for sale of the books. But Anderson was not and could not be the estate's agent to collect the proceeds of the sale of the painting as to which the estate had no knowledge and gave no authority whatever. In collecting such proceeds, Anderson was acting as Sickles' agent and not the agent of the estate. Accordingly when Anderson kept one-half of the cash from the sale of the picture and falsely represented to Sickles that only half had been paid in cash, it was breaching its agency with Sickles, not its agency with the estate, and the loss ensuing should be charged to Sickles as principal."

Friedman had wronged the study group at least to the extent of failing to arrange with Capitol for operation of the projected 7/2-9/4 and 7/4-9/5 charters and misusing the great bulk of the money paid him by the study group. Unlike the situation in the Schaffner case, however, the study group had reached no private understanding with Friedman. NYSTSG trusted Friedman, as a travel agent, to arrange the charters it planned and to apply to those charters the funds remitted to him. Upon the uncontroverted evidence, Capitol knew that Friedman was receiving remittances from the study group, commingling them with his own funds, and making payments to the carrier by checks drawn on his agency account. Nevertheless Capitol gave Friedman carte blanche to complete collection of the charter price. When Friedman received payments from the study group for the contracted July 1 charter he was the carrier's agent for collection. It follows that Capitol constructively received the full price of the July 1 charter out of the moneys that the study group paid Friedman for charters to be operated by Capitol.

Regulated air carriers in their dealings with the public are held to even more exacting standards than those comprised in the general law of

[Tr. 650]

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agency. As the Board said in Standard A. L., Noncertificated Operations, 10 C.A.B. 486 at pages 494 and 495 (1959):

"Actually, the responsibility of air carriers for the actions of their agents rests upon a broader foundation than an application of the principles of agency applied between private litigants. In those situations involving regulatory statutes, the principal is generally charged with the responsibility for the acts of its agents and employees, even in situations in which there would perhaps be no liability for damages in a private law suit. This principle is one of public policy, for in its absence the purpose of the regulatory statute would be defeated. 11/"

"11/ See e.g., Globe Cartage Co., Inc., Common Carrier Application, 42 M.C.C. 547 (1943), aff'd sub. nom. U.S. v. Hancock Truck Lines, 324 U.S. 774 (1945); United States v. Brooklyn Terminal, 249 U.S. 296 (1919); Union Stock Yard & Co. v. U.S., 308 U.S. 213 (1939); U.S. v. Illinois Cent. R. Co., 303 U.S. 239, 244 (1938); Park, Austin & Lipscomb v. Federal Trade Com'n, 142 F. (2d) 437 (C.C.A. 2, 1944), cert. den. 323 U.S. 753 (1944)."

Friedman was, by the terms of the charter agency agreement, Capitol's agent to solicit 15/ and develop the specified charter traffic and to represent Capitol with the chartering organization in documenting the charter flight and meeting Government requirements. NYSTSG also made Friedman its agent by making payments to his order instead of transmitting to him checks payable to the carrier as directed by the aircraft charter contract between NYSTSG and Capitol. By the terms of the charter agency agreement Friedman had bound himself not to accept charter payments in his name but to assure that the chartering organization make its remittances payable to the carrier. Capitol, however, did not hold Friedman to observance of the last mentioned

15/ The traffic was solicited, not by Friedman, but by the study group itself within its own membership.

commitment but acquiesced in Friedman's acceptance of checks from NYSTSG payable to himself, so that the charter payments were commingled with the travel agent's funds. By so doing, and by putting no restraint on its district sales manager's tolerance of repeated and long-continuing defaults by Friedman in transmitting payments as prescribed in the aircraft charter contract, the carrier ratified Friedman's course of action and incurred liability for Friedman's failure to keep faith with NYSTSG. Capitol, without any unusual effort, could have ascertained whether its district sales manager had actually received payments at the times prescribed by the charter contract. By failing to do so the carrier opened the way to Friedman's diversion of the funds that NYSTSG entrusted to him and incurred responsibility for the consequences. The respondent's brief states—

"The fact that payments by check of the travel agent were accepted not only in this instance but in accord with general practice in the industry, merely underscore the fact that in practically all charter arrangements of this type and particularly in this instance the travel agent is acting on behalf of, under appointment of, in a fiduciary relationship to, and therefore, as agent of, the charterer. * * *

Unquestionably the charterer reposed trust in the travel agent and the latter was agent and fiduciary of the charterer. He was more than that, however, for the carrier made him its own agent for collection when it acquiesced in study group remittance to the agent and remittance by the agent to the carrier.

The study group, having received no objection from Capitol that the initial deposit, which Capitol received in the form of Friedman's agency check dated January 11, 1965, must be paid by the charterer's check to

[Tr. 652]

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the carrier and not to the agent, received by clear implication Capitol's manifestation of authority in Friedman to collect as Capitol's agent and in Capitol's behalf. Subsequent payments from the study group to Friedman were made pursuant to that manifestation and under the assurance that Capitol acquiesced in Friedman's receipt of payments in its behalf.

The record does not support the allegation that the Bureau is invoking a sanction against Capitol for acts done by someone over whom Capitol had no control. The violations charged do not stem merely from the fact that the study group put the funds under Friedman's control and that Friedman misused those funds; they stem from Capitol's acquiescence in Friedman's acceptance of checks payable to Friedman's order, from Capitol's prolonged failure to require punctual payment of the charter price, thus enlarging Friedman's opportunity to misapply the funds entrusted to him for that purpose, and from Capitol's ultimate decision to exact additional money from the tour passengers.

The Documentation Issues

With respect to the charge of failure to obtain the portions of the Statement of Supporting Information that the charterer and the agent must prepare, Capitol submits its diligent efforts to obtain these documents, cites the disappearance of both Friedman and Mrs. Friedman and the impossibility of locating any other officer of the charterer, and argues that cancellation of the flight and the stranding of the passengers would have worked great harm as compared with operating the flight in spite of the

lack of these portions of the documentation. As the carrier points out, Capitol and other carriers had operated flights for the study group in earlier periods and had been satisfied that the study group was charter-worthy and that participation had been confined to bona fide members of the study group and members of their immediate families. This being so, the respondent urges, the purpose of the required documentation had been accomplished and the failure to obtain a complete Statement of Supporting Information did not result in violation of Part 295.

The suggestion that the documentation of previous study group charters operated as continuing proof that the organization was charter-worthy and that participation was properly limited is unacceptable. There is always a possibility of material change in the chartering organization or in the composition of the particular charter. Part 295 prescribes current documentation for each charter and does not entrust accomplishment of the regulatory purpose to a favorable presumption based on prior documentation. Operation of the flight without completing the required documentation is a substantial violation of the regulations. The violation is not excused even when account is taken of the adverse consequences of a last-minute cancellation of the flight. Capitol, by firm handling, could have obtained direct payment from the study group of the full charter price accompanied by complete documentation or, failing this, could have cancelled the charter long before the flight date without any consequences as severe as would have attended cancellation late in June 1965.

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Capitol asserts in its brief that it did obtain a manifest which could not be certified due to the disappearance of the president of the charterer. The passenger manifest introduced into the record (exhibits BOE-19 through BOE-25) was prepared by Capitol itself, includes a notation of the weight of each passenger and his baggage, and bears an imprint "Part of Weight & Balance Manifest". Obviously this is not the certified passenger manifest required by Economic Regulation § 295.35, which requires that the charterer classify each passenger in one of three prescribed relationship categories and that the charterer certify such classification. The air carrier has no independent knowledge as to the charter passengers sufficient to give it a basis for making such a classification or certification. Clearly, Capitol operated the flight without obtaining the certified passenger manifest required by § 295.35.

The Sanction

It is true, as Capitol urges, that cancellation of the flight late in June 1965, when Friedman's misconduct and the active intervention of New York's law enforcement officials had brought wide notoriety, would have imposed extreme hardship on the passengers and would have adversely affected the public, the entire transatlantic charter program, and the industry in general, as well as Capitol. The carrier would not have faced this difficulty, however, if it had monitored the situation and insisted on payment of the tariff price in accordance with the terms of the charter agreement instead of condoning Friedman's continuing evasion until three days before

the flight departure. The quandary that Capitol then faced was the product of the carrier's own failure to exercise the vigilance that is requisite in carrying on business.

The requested cease and desist order is an appropriate remedy, notwithstanding the fact that the study group and Mrs. Friedman are enjoined from engaging in charter activities and that Friedman himself is serving a prison sentence. The restraints against these participants have no bearing on Capitol's extensive civil charter operations, and the violations here shown on the carrier's part call for a remedial sanction. The Board is not required to assume that the violations will not be repeated.^{16/}

The Bureau's brief urges that the Board order Capitol to refund the \$92.50 collected from each charter passenger and submits that a cease and desist order would be inadequate relief unless it provided for such restitution. Capitol has had no opportunity to address itself to the restitution proposal, for the complaint requests only a cease and desist order and "such other and further relief as the Board may deem proper" and the Bureau did not disclose, prior to its brief, that it would seek an order directing Capitol to make restitution. The refund sanction is beyond the issues raised by the complaint. Moreover, the Board has recognized that it lacks authority to grant reparations of this character.^{17/}

^{16/} See Shulman, Inc., Enforcement Proceeding, 30 C.A.B. 216 (1959) and Complaints v. American Shippers, Parcel Air Service, 30 C.A.B. 1478 (1960).

^{17/} International Latex v. AAXICO, Enforcement, 33 C.A.B. 502 (1961).

[Tr. 656]

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Summary

Upon the basis of the foregoing considerations and of the entire record it is found that Capitol Airways, Inc., in operating for New York State Teachers Study Group a charter flight that departed New York City on July 1, 1965, 1) collected a greater compensation for air transportation than the fares specified in its tariffs and thereby violated § 403(b) of the Federal Aviation Act of 1958. as amended, 2) failed to obtain either § A or § B of Part II of the Statement of Supporting Information required by § 295.12 of the Board's Economic Regulations, and 3) failed to obtain a certified passenger manifest as required by § 295.35 of the aforesaid regulations, and it is concluded that Capitol Airways, Inc., should be ordered to cease and desist from the aforesaid violations.

An appropriate order is attached.

Barron Fredricks

Barron Fredricks
Hearing Examiner
November 30, 1966

Payments from New York State Teachers Study Group
to Friedman

<u>Exhibit No.</u>	<u>NYSTSG Check No.</u>	<u>Date</u>	<u>Amount</u>	<u>Purpose of Check</u>
BOE-55	583	11/9/64	\$ 120.00	2,000 brochures \$ 20.00 2,000 5¢ stamps 100.00
BOE-56	584	11/9/64	82.71	stationery, cards, letterheads, and envelops
BOE-57	586	11/23/64	500.00	deposit to World Airways for Japan charter
BOE-58	587	11/27/64	235.00	bill of 11/2/64
BOE-59	592	12/7/64	1,690.72	deposit to Aeronaves— \$1,196.04 labels \$177.00 Orient brochures 65.00 stamps (04) 252.68
BOE-60	593	12/10/64	660.00	for one night's dep. Del Prado Hotel — Mexico City for Easter flight
BOE-61	594	12/15/64	500.00	reimbursement for advance payment to Taxco Hotel — Easter flight
BOE-62	595	12/17/64	1,000.00	partial payment for Easter vacation tour (Elcano Hotel)
BOE-63	596	12/21/64	187.00	postage \$107.00 brochures 80.00
BOE-64	598	12/21/64	660.00	balance of deposit to Elcano Hotel (Acapulco, Mexico) Mexican Easter package

(continued)

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<u>Exhibit No.</u>	<u>NYSTG Check No.</u>	<u>Date</u>	<u>Amount</u>	<u>Purpose of Check</u>
BOE-65	599	12/28/64	\$ 2,773.00	repayment of deposit to British Eagle International Airways (flight July 19)
BOE-66*	600	12/31/64	3,000.00	for additional part payment to Capitol Airways, Inc., for summer charters
BOE-67	605	1/4/65	1,200.00	for part payment Mexican Easter package (for AA Travel Service)
BOE-68	606	1/4/65	278.80	for part payment to Capitol Airways N.Y.-London-Paris-N.Y. 7/2-9/4/65
BOE-69*	607	1/4/65	933.00	for part payment to Capitol Airways charter N.Y.-Paris-Rome
BOE-70*	608	1/11/65	5,281.00	for part payment to Capitol Airways, Inc., charters 7/1 & 7/2
BOE-71	615	1/23/65	6,000.00	for additional payment on Mexican Easter package
BOE-72	618	1/26/65	5,000.00	for part payment Mexican charter
BOE-73*	619	2/1/65	2,000.00	for deposit to Capitol Airways, Inc., 2 jet charters 1966
BOE-74*	622	2/8/65	5,000.00	for part payment on 1965 charters to Capitol Airways, Inc.
BOE-75	623	2/8/65	173.00	for secretarial fees

See footnotes on page 4 of this appendix

(continued)

<u>Exhibit No.</u>	<u>NYSTSG Check No.</u>	<u>Date</u>	<u>Amount</u>	<u>Purpose of Check</u>
BOE-76	624	2/8/65	\$ 2,000.00	for additional deposit to World Airways on Orient charter
BOE-77	625	2/10/65	2,000.00	for A.A.Travel additional payment on Mexican Easter Trip
BOE-78	628	2/15/65	5,532.00	balance due on Aeronaves Mexican charter
BOE-79	---	2/15/65	166.00	for making up Orient brochure & postage for general mailing
BOE-80	630	2/23/65	6,000.00	on account summer program
BOE-81	633	2/27/65	10,500.00 [†]	for deposit to World Airways on Orient charter
BOE-82	634	2/27/65	1,000.00 [†]	for Capitol Airways, Inc., deposit on 7/4-9/5 charter
BOE-84*	644	3/6/65	5,000.00 [†]	for Capitol Airways, Inc., a/c for charter Rome via Paris 7/1-9/3/65
BOE-85	645	3/6/65	5,000.00 [†]	for Capitol Airways, Inc., a/c for charter Rome via Paris 7/4-9/5/65
BOE-83	643	3/6/65	5,000.00 [†]	for Capitol Airways, Inc., a/c for charter London- Paris 7/2-9/4/65
BOE-86	662	3/15/65	5,000.00 [†]	for Capitol Airways, Inc., charter 7/2-9/4/65 London-Paris
BOE-87*	663	3/15/65	5,000.00 [†]	for Capitol Airways, Inc., jet charter Rome via Paris 7/1-9/3/65

See footnotes on page 4 of this appendix

(continued)

[Tr. 660]

Appendix 1
Page 4 of 4

<u>Exhibit No.</u>	<u>NYSTSG Check No.</u>	<u>Date</u>	<u>Amount</u>	<u>Purpose of Check</u>
BOE-88	663	3/15/65	\$ 5,000.00 [#]	for Capitol Airways, Inc., jet charter 7/4-9/5/65 Rome via Paris
BOE-89	664	3/15/65	366.25	for secretarial services bill paid to Olsten's
BOE-90	677	3/24/65	10,000.00 [#]	for additional part payment to Capitol Airways charter #1 London-Paris 7/2-9/4/65
BOE-91 [*]	608	3/24/65	10,000.00 [#]	for part payment to Capitol Airways charter #2 Rome via Paris 7/1-9/3/65
BOE-92	679	3/24/65	10,000.00 [#]	for part payment to Capitol Airways charter #6 7/4-9/5/65 Rome via Paris
BOE-93	707	4/12/65	17,146.00 [#]	balance due (paid to A.A. Travel) for Mexican Easter trip
BOE-94	712	5/1/65	24,957.00 [#]	for final payment to British Eagle Airways for 7/18 charter
BOE-95 [*]	787	5/19/65	20,932.40 [#]	on a/c 3-1965 Europe jet charters — Capitol Airways, Inc.
BOE-96	788	5/19/65	30,000.00 [#]	on a/c World Airways 7/1-9/1/65 Orient charter

* Allocated or allocable to the July 1 charter to Rome via Paris.

Certified.

[Tr. 661]

Appendix 2
Page 1 of 2

Evidence Bearing on Capitol's Constructive Receipt
of Funds Paid by the Study Group to Michael Friedman

- 1) Acceptance by carriers of charter payments from the travel agents is a practice that prevailed throughout the industry, and it was common practice for carriers to accept such payments in the form of checks drawn on the travel agent's account (testimony of Daniel A. Mitchell, Jr., Capitol's district sales manager in New York City, tr. 165-168; testimony of Mrs. Sari Friedman, president of the study group, tr. 70; testimony of Michael S. Friedman, tr. 112, 113).
- 2) Capitol received, deposited to its own account, and credited as part payment on the July 1 charter checks drawn by Friedman on the Nelson agency account. Check number 542 dated January 11, 1965, for \$5,281, Exhibit BOE 98, shown as item 2 on Capitol's deposit slip, Exhibit BOE 15, and acknowledged by Capitol's letter dated January 14, 1965, Exhibit BOE 6; check number 662 dated February 8, 1965, for \$5,185.20, Exhibit BOE 99, shown as item 3 on Capitol's deposit slip, Exhibit BOE 16. Each deposit slip lists three items and carries after each item the notation "agent" in parentheses. This notation means that the check deposited was issued by the agent and not by the charterer. Mitchell never received from Capitol's home office any instruction not to accept payments on charters from travel agents. Testimony of Daniel A. Mitchell, Jr., tr. 163-166. It was Friedman's practice, in dealing with Capitol on charters, to make payments from the agency account instead of having the charterer remit directly to Capitol; he had discussed these alternatives with Schofield and Mitchell and was given to understand that the carrier

... required direct remittance from the charterer only where the carrier did not know the agent, but would accept payment from an agent that it knew. Friedman had been agent on charters for the study group operated by Capitol prior to the summer of 1965 and had paid Capitol out of the agency account. (Tr. 112, 113.)

- 3) Mitchell never met Mrs. Friedman (tr. 168) nor communicated with the study group in respect to payments on the July 1 charter (tr. 171). Capitol, through its vice president, finance, who as a member of the carrier's informal management committee participated in all major decisions (tr. 335), was aware early in June 1965 of the difficulty with Friedman and the study group (tr. 323, 324). Information of the problem had come to Capitol's home office through the transmittal to it of a copy of each of Mitchell's letters to Friedman and through telephone conversations between Mitchell and Mansfield. (Tr. 308, 309.)

[Tr. 662]

Appendix 2
Page 2 of 2

- 4) The district sales manager did not usually allow payments later than the times prescribed by the aircraft charter contract, except that when there were special circumstances the schedule for payments was sometimes extended by Capitol's home office. In respect to the July 1 charter Mitchell applied to Mansfield, the director of sales at Nashville, and an extension of time was granted in view of the fact that Friedman had made deposits on other charter flights that Capitol was to operate and both Mitchell and Mansfield judged that Friedman was a man of means whose cash was a little tied up (tr. 173-175).

[Tr. 663]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Issued under delegated authority

CAPITOL AIRWAYS, INC.,
ENFORCEMENT PROCEEDING

Docket 16370

ORDER TO CEASE AND DESIST

A full public hearing having been held in the above-entitled proceeding and the examiner, upon consideration of the record, having issued an initial decision containing his findings and conclusions, pursuant to authority delegated to hearing examiners under Rule 27 of the Rules of Practice in Economic Proceedings, which initial decision is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Capitol Airways, Inc., its officers, directors, agents, successors and assigns, be and they are hereby ordered to cease and desist 1) from charging, demanding, collecting or receiving a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in said air carrier's effective tariffs, and 2) from operating any pro rata charter flight without obtaining §§ A and B of Part II of the Statement of Supporting Information required by § 295.12 of the Board's Economic Regulations, or without obtaining a certified passenger manifest as required by § 295.35 of said regulations.

2. That this proceeding be and it is hereby terminated, except that the proceeding may be reopened by the Board at any time for good cause shown.

3. This order shall become effective as the final order of the Board on the 31st day after the date of service of this order and the initial decision attached hereto unless a petition for discretionary review is filed within 25 days after service hereof in accordance with Rule 28 of

[Tr. 664]

the Rules of Practice in Economic Proceedings (14 CFR 302.28) or the Board issues an order to review upon its own initiative. If a petition for discretionary review is timely filed or if action to review is taken by the Board upon its own initiative, the effectiveness of this order shall be stayed until further order of the Board.

/s/ Barron Fredricks

Barron Fredricks

Hearing Examiner

[Tr. 665]

PROOF OF SERVICE
I hereby certify that on
DEC 19 1966
this Document was served
on parties listed below:
/s/ Judy Mitchell, Service Mail
Docket No. 16370 Clerk

INITIAL DECISION OF EXAMINER BARRON FREDRICKS

CERTIFIED

Mr. George Berkowitz
Counselor at Law
Woolworth Building
233 Broadway
New York, New York 10007

REGULAR

Mr. Francis N. Pollack
11 West 42nd Street
New York, New York
(For Teacher, members of
NYSTSG) (Travel Committee)

Capitol Airways, Inc.
Mr. J. F. Stallings, Agent
Berry Field
Nashville, Tennessee 37217

Mr. Harold Colvin, Reservation Agent
Division of Educational Service
National Education Association
1201 - 16th Street, N. W.
Washington 6, D. C.

Airborne Freight Corporation
Mr. J. D. McPherson, Agent
San Francisco International Airport
San Francisco, California 94128

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DOCKET SECTION

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Workman
Aitchison
Meagher

Examiner: Fredricks Room-730

Bureau Counsel: Burstein B-50

B-76, B-72, B-52

B-22
Calvin B-11

①
- 665 -

[Tr. 666]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

RECEIVED
DOCKET

Tr. 666

JAN 13 4 30 PM '67

CIVIL AERONAUTICS
BOARD

CAPITOL AIRWAYS, INC.
Respondent

Enforcement Proceeding

Docket 16370

PETITION OF
CAPITOL AIRWAYS, INC.
FOR REVIEW

SEAMON AND SULLIVAN
700 Woodward Building
Washington, D.C. 20005

GEORGE BERKOWITZ, Esquire
233 Broadway
New York 7, New York

Attorneys for
Capitol Airways, Inc.

January 13, 1967

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[Tr. 668]

- 2 -

to provide desired charter air transportation. In this case, as in most large charter movements, the agent solicited and procured lift commitments from several carriers, took substantial part in organizing the charters and was entrusted by the charterer with extremely large unallocated sums of money, not only for the payment of air transportation charges, but also for numerous other administrative expenses as well. Consistent with industry practice,^{2/} Capitol, upon receipt of the charter contract signed by the chartering organization, executed an "agency agreement" limited to only one of the several flights contemplated by the chartering organization, which provided for the payment of a commission to the agent.

The charter contract, signed by the charter organizer, contained a prominent notice that all checks were to be made payable to the carrier and the "agency agreement" provided that the agent was not to receive moneys as agent of the carrier.

The issue in this case involves the question of the respective liabilities of the carrier and the chartering organization under such circumstances where the intermediate or agent, selected by the charterer, embezzles, loses, has stolen, otherwise commits some breach of trust, acts improperly, or is otherwise unable to fulfill his obligations. The position of the Bureau of Enforcement would impose extensive liabilities upon the air carrier and exonerate from liability the chartering organization, which selected the agent through whom the carrier is forced to do business, contrary to the basic principles of local agency law which otherwise would determine the respective liabilities and responsibilities of the parties. Under such law,

^{2/} As formerly required by interim certificates and Board rules and as still required by Part 208.

the person bears the risk who entrusts the moneys to the intermediary and made the loss possible.

The Examiner adopted the position of the Bureau. In order to do so, he had to ignore the sworn testimony of the charter organizer and the agent, the principal witnesses of the Bureau, as to their intent and the purposes underlying the specific dealings at issue and to rely upon a statement of the Board, in a completely dissimilar and inapplicable situation, that the responsibility of air carriers for the actions of their agents rests upon a broader foundation than an application of the principles of agency applied between private litigants (I.D. 30).

The Examiner found that "Unquestionably the charterer reposed trust in the travel agent and the latter was agent and fiduciary of the charterer" (I.D. 31). However, he completely ignored the import of this fact. Capitol did in fact deal with the agent as agent of the charterer, and did not become liable for actions of the agent in his capacity as agent for the charterer, so commissioned and controlled by his wife, the President of the charterer. He thus reached conclusions of fact and law at war with the law of agency as applied in the State of New York, and ignored the practical realities of the course of dealing with which carriers are faced on most charters.^{3/}

3. The instant proceeding is a matter of first impression and involves far-reaching implications as to the administration of charter contracts.

^{3/} Under the Board's current rules, the agent may be a member of the charter organization, and even may collect funds from the individual participants and otherwise assist in the organization of the charter. To make the carriers liable for actions of strangers chosen by others to represent them is to foist an intolerable burden on the carriers.

[Tr. 670]

- 4 -

It can have a far-reaching impact upon all air carriers engaged in charter operations. The Examiner's decision would, in fact, negate existing commercial law and impose upon air carriers liabilities not imposed by ordinary commercial law and not contained in any regulation, rule or requirement of the Board.

The instant proceeding would therefore radically alter existing commercial obligations of air carriers and impose new duties, responsibilities and liabilities beyond those involved in this rather limited proceeding. In this connection, Capitol has been constrained to resist the enforcement action because of the far-reaching and basic principles involved.^{4/}

4. The Examiner erred in the application of the legal principles involved.^{5/} He reached his conclusions based upon the application of cases from jurisdictions outside the State of New York and ignored the specific application of New York law. In addition, he misapplied the cases cited by concluding in effect that the intermediary was the agent of Capitol and ignoring the agency relationship he found to exist between the agent and the

4/ The issues herein transcend the \$16,000 which the Bureau apparently believes was unjustly collected by Capitol. They involve potential far greater liabilities which may arise out of the instant and similar transactions, such as to persons who paid or allegedly paid the chartering organization to participate on charter flights not contracted to Capitol but to other air carriers.

5/ Capitol is not undertaking to document all of the subsidiary legal conclusions contrary to law or all of the erroneous findings of fact in the Initial Decision. The ultimate conclusions of the Examiner, based upon mixed questions of law and fact, is clearly contrary to law, as demonstrated by different findings in several proceedings on the same facts in New York Courts. It is counsel's belief that the provisions for discretionary review require only that it be demonstrated that the ultimate conclusions are erroneous and are of sufficient importance to require review by the Board.

charterer. For example, the Examiner quoted from Reusche v. California Pacific Title Insurance Company, a California case, which states:

"The law reasons that where one of two innocent parties must suffer, the loss should be accepted by the principal who is responsible for the selection of the agent and for the definition of his authority". (Emphasis Supplied). (I.D. 27).

It is clear from the record that the chartering organization entrusted the agent, who was convicted of larceny of over \$165,000 from the chartering organization, with approximately a quarter million dollars for numerous expenses in connection with various charter trips by various carriers far transcending the limited amount involved in the single Capitol charter, and that the charterer thus made the loss possible.

In his reliance upon agency cases involving "ratification", the Examiner ignored his own finding that the agent was also the agent of the charterer and treated the matter solely as if the agent were in the sole employ of Capitol, so that the application of the principles of law upon which he relied are not appropriate in the light of the specific facts involved. Some of the facts ignored are most material to the legal conclusion and were not specifically discussed in the Initial Decision. Thus the Initial Decision is clearly based upon conclusions contrary to law.

5. This proceeding involves substantial and important questions of fact as well as law. The basic facts are not sufficiently set forth in the Initial Decision to permit the Board to determine whether the result is correct. For example, the Initial Decision omits reference to the testimony of the charter organizer that when she paid her husband she assumed that the money would be paid to the proper agencies (Tr. 76-77); that she relied upon him and never distrusted him (Tr. 77); that he acted as her agent

[Tr. 672]

- 6 -

in paying moneys to various airlines (Tr. 77); that the services performed were performed on behalf of the charterer (Tr. 80, 82); and that she undertook to control the disbursement of funds by the agent. The Examiner also attributed to Capitol knowledge of transactions between the charterer and the agent, where there is no evidence of knowledge upon the part of Capitol, but where the full facts were undoubtedly known to the charterer. These are crucial and determinative facts, adduced by the Bureau's principal witnesses themselves, which require that the Board itself review this case not only to determine the specific factual circumstances here involved and the outcome of this controversy, but also to determine whether rules of general applicability relating to such relationships are necessary for future application throughout the entire industry.

6. The Examiner clearly erred in finding that a cease and desist order should be issued against Capitol in this proceeding. Even if his legal conclusion were correct, the loss here involved unusual circumstances and the resultant actions taken by Capitol were matters of novel impression resolved (1) under emergency circumstances in order to avoid undue hardship upon the innocent victims of wrongdoing of an intermediary selected by the chartering organization itself; (2) in the face of a great deal of notoriety which could only reflect adversely on the entire air transportation industry; and (3) in circumstances of unknown and, at that time, indeterminate liability. There is no finding by the Examiner that Capitol acted in other than good faith or willfully violated any regulation of the Board or that its conduct was in any way reprehensible or otherwise such as to require the punitive penalty of a cease and desist order. The questions of law involved were and are, even in the light of information not available to Capitol at the time,

complex and controversial. This is demonstrated by the very involved, although overly simplified discussion in the Initial Decision itself. Clearly under these circumstances, there is no justification for imposition of a sanction upon Capitol which acted in accordance with advice of its New York counsel who had not only long experience in CAB matters but also in local commercial law in the State of New York. It operated the flight in question, rather than cancelling the flight. In the final analysis the premise upon which the Examiner justified a sanction was Capitol's grant of extension of time for making payments, rather than cancelling the flight. This would have imposed greater hardship on the group which had already paid Capitol over \$35,000 for the charter services involved, and is not an appropriate basis for a sanction.

WHEREFORE, the foregoing premises considered, Capitol Airways, Inc. respectfully prays that the Honorable Civil Aeronautics Board will exercise its right of review of this proceeding and will review same in its entirety; and for such other and further relief consistent with the premises herein as to this Honorable Board may seem fitting and proper.

Respectfully submitted


Theodore I. Seamon

Attorney for
Capitol Airways, Inc.

January 13, 1967

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Tr. 674

[Tr. 674]

- 8 -

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copy of the foregoing petition by mailing copy thereof, postage prepaid and properly addressed to the Bureau of Enforcement.

Donna K. Kent
Donna K. Kent

77 January 13, 1967

[Tr. 675]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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CIVIL AERONAUTICS
BOARD

CAPITOL AIRWAYS, INC. *
Respondent, *
Enforcement Proceeding *

Docket 16370

ANSWER TO PETITION OF
CAPITOL AIRWAYS, INC. FOR DISCRETIONARY REVIEW

On January 13, 1967, respondent Capitol Airways, Inc. (Capitol) filed a Petition for Discretionary Review of the Examiner's Initial Decision in this case. In its petition Capitol alleges that the Initial Decision (1) is based on erroneous findings of material fact, (2) is based on ultimate legal conclusions contrary to law, and (3) involves substantial, important and novel questions of law requiring review by the Board. For the reasons set forth below the Bureau of Enforcement submits that Capitol's petition is without substance and should be denied.

With respect to Capitol's first contention -- that the Examiner relied on erroneous findings of fact -- the petition is wholly deficient. Although Capitol alleges that the Examiner made erroneous findings of material fact, it cites none. The examples cited in paragraph 5 (pp. 5-6) of Capitol's petition as material omissions from the Initial Decision are nothing more than out-of-context fragmentary references to the thoughts of the agent's (Friedman's) wife about her husband and what he was doing with the organization's money. The other reference is to activities performed by the agent

[Tr. 676]

-2-

for the charterer, and this is, in fact, dealt with by the Examiner (I.D. pp. 8, 30). None of these alleged omissions is essential to the relationship between Capitol and Nelson Travel/Friedman, which is at the heart of this controversy. ^{1/} This case turns, as the Examiner pointed out, "on the course of dealings between the charterer, the agent and the carrier." (I.D. p. 4).

The Examiner, in his detailed factual findings (I.D. pp. 4-21), completely set forth the history of the NYSTSG charter flight and the basis for holding that Nelson Travel/Friedman acted as Capitol's agent, with Capitol's ratification, in collecting and receiving payments for the flight. Briefly these are:

(1) The agency agreement itself by which Capitol appointed Nelson Travel/Friedman as Capitol's agent and agreed to pay a 5 percent commission (I.D. p. 5).

(2) Payments by NYSTSG to Nelson Travel/Friedman and/or Capitol directly in an amount sufficient to cover the \$52,331 cost of the charter flight (I.D. p. 10).

^{1/} Contrary to Capitol's statement at p. 2 of its petition that it is "forced" to do business with an agent selected by a charterer, Capitol is free to choose any agent with whom it wants to do business. Capitol has chosen to operate through agents selected by chartering organizations, which paves the way for abuses such as the ones here.

(3) Capitol's acquiescence in Nelson Travel/Friedman's acceptance of checks payable to Nelson Travel/Friedman's order (I.D. pp. 11-16). 2/

(4) Capitol's consistently looking to Nelson Travel/Friedman as its only means of obtaining payment for the flight (I.D. 12-15).

(5) Capitol's grant of an extension of time for payments from Nelson Travel/Friedman after the agent became delinquent in making payments (I.D. p. 16).

(6) Capitol's knowledge, at the executive level, that Nelson Travel/Friedman was being looked to for payment on the charter (I.D. pp. 15-16).

2/ Capitol's acquiescence was in the face of a specific provision of the agency agreement which the Examiner carefully quoted verbatim:

"Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name."

This is the paragraph which Capitol incorrectly says " . . . provided that the agent was not to receive moneys as agent of the carrier." (Original emphasis, Pet. p. 2). On the contrary, the provision makes it clear that Nelson Travel/Friedman was to see to it that the funds were made payable to Capitol, and in fact, paid to Capitol. This is further evidence that Nelson Travel/Friedman was to act as the carrier's agent on the charterer's payments.

[Tr. 678]

-4-

(7) Capitol's reliance on Nelson Travel/Friedman for payment on the July 1 charter until June 28, when it contacted the chartering organization and/or its members directly for the first time about delinquent payments (I.D. pp. 16-17).

(8) Capitol's last minute threat to cancel the flight unless each passenger paid an additional \$92.50 to cover the balance of \$16,864.80 which Nelson Travel/Friedman had not paid over to Capitol (I.D. p. 17).

These factual findings, fully documented in the record and not controverted by Capitol, support the Examiner's finding:

"The violations charged do not stem merely from the fact that the study group put the funds under Friedman's control and that Friedman misused those funds; they stem from Capitol's acquiescence in Friedman's acceptance of checks payable to Friedman's order, from Capitol's prolonged failure to require punctual payment of the charter price, thus enlarging Friedman's opportunity to misapply the funds entrusted to him for that purpose, and from Capitol's ultimate decision to exact additional money from the tour passengers." (I.D. p. 32).

Capitol does not challenge the accuracy of the Examiner's factual recital on these points, and the "omissions" Capitol complains of do not, and cannot, alter these factual findings. Throughout its petition Capitol avoids the focal point of the Initial Decision --- the series of acts by which Capitol ratified the conduct of Nelson Travel/Friedman and acquiesced in its role as agent for Capitol in the collection of funds. The "omissions" Capitol refers to simply do not reach this central issue. By avoiding this issue and disclaiming its responsibilities Capitol

seeks to obscure the fact that it wrongfully collected an additional \$92.50 from each of the charter passengers above the lawful tariff rate. ^{3/} The fact is that each passenger on the July 1 charter was wrongfully assessed the extra amount of \$92.50, and Capitol was responsible for the wrongful assessment. The Examiner agreed, and found that a cease and desist order should issue. He did not find, however, that an order should issue specifically directing Capitol to pay back the money. Although the Examiner may be correct that the Board does not have the authority to issue such an order, Capitol is required to observe its filed tariffs. Unless and until Capitol pays \$92.50 to each of these particular passengers it will be in continuing violation of section 403(b) of the Federal Aviation Act and subject to further sanctions. This is as it should be where innocent parties have been injured through the actions of the carrier.

With respect to Capitol's second contention -- that the Examiner's Initial Decision is based upon legal conclusions clearly contrary to law -- Capitol's petition is again wholly deficient.

^{3/} Hints at the real reasons for Capitol's obduracy are found in footnotes 3 and 4 of its petition, where Capitol indicates its reluctance to be responsible for the acts of travel agents, and its fear that a decision against Capitol here will somehow imperil it with respect to passenger claims on other charters involving Nelson Travel/Friedman on which Capitol never entered into any charter agreements. The short answer is that Capitol has a legal responsibility for the acts of its agents, and the Board cannot predicate a ruling on the basis of fanciful law suits conjured up by Capitol's counsel.

[Tr. 680]

-6-

Capitol pitches its argument on two grounds, i.e., the supposed failure of the Examiner to cite New York case law, and the alleged misapplication of the cases cited. Capitol errs on both grounds.

In the first place Capitol furnishes no support for its thesis that the substantive issues in an administrative proceeding such as this case can be controlled only by the common law of New York, and the Bureau of Enforcement has been unable to find any case law extending the doctrine of Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938), that far. ^{4/} The Board under any circumstances is entitled to rely on the common law of states other than New York in resolving the questions of this agency relationship. Furthermore, although some acts involved in this case took place in New York, the agency agreement indicates Capitol's signature was affixed in Nashville, Tennessee, and some critical acts of ratification occurred in Nashville. Of note, too, is paragraph 17 of the charter agreement which provides that the agreement "shall be construed according to the law of the District of Columbia." Thus Capitol's exclusive reliance on New York law is without foundation. This really makes no difference since the Examiner did apply New York law, as well as cases from other jurisdictions. He cited, (I.D. pp. 23, 25) as one of his leading cases, Ramsay v. Miller, 202 N.Y. 72 (1911) on the fundamental

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^{4/} The Erie doctrine applies to diversity cases in federal courts, and reaches only non-federal questions. See Moore's Federal Practice, Second Ed. par. 0.304 et seq. Lehman Brothers Interlocking Relationships Case, 15 C.A.B. 656, 660 (1952).

[Tr. 681]

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question of a principal's ratifications of the acts of another. This hornbook proposition is amply supported in the Initial Decision by the Ramsay case, the Supreme Court's decision in Bronson's Executor v. Chappell, 79 U.S. 681 (1870), (I.D. p. 25) and the common law of other jurisdictions (I.D. pp. 26, 27).

Capitol's complaint is that the Examiner did not rely on the cases cited in its brief. These decisions are distinguishable on their faces ^{5/} and simply not in point regarding the relationship in this case. Consequently, Capitol is wrong on all counts. The Examiner properly applied the pertinent case law -- including New York cases -- and the fact that he did not rely on the cases cited by Capitol is hardly a basis for granting review.

Finally, Capitol claims that review is required here because this case "involves substantial, important and novel (insofar as they relate to Board policy) questions of law, policy questions of law, policy and discretion, transcending the instant circumstances . . ." (Pet. p. 1). In paragraphs 3 and 6 of its petition Capitol makes an argument that this case involves a novel question with far-reaching implications, and that Capitol acted in good faith in unusual circumstances.

Capitol is just plain wrong. This case is not really any more novel than any other situation in which violations are committed.

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^{5/} See, e.g. the Examiner's discussion at I.D. p. 28 of Schaffner v. New York Trust Co., 34 N.Y.S. 2d 537 (1942), a case heavily relied upon by Capitol.

[Tr. 682]

-8-

The only novelty here is that Capitol took the unusual step of collecting an additional \$92.50 from each passenger to make up the balance of the money not turned over to it by Nelson Travel/Friedman. The responsibilities of the carrier, agent and charterer are clearly set forth in the Board's charter regulations, ^{6/} and fundamental principles of agency law govern the relationships. The Examiner clearly spells these out in the Initial Decision. The emergency circumstances alleged by Capitol were of its own doing. By handling this flight properly, Capitol would have avoided the undue hardship on the passengers and its own difficulties. It either could have obtained direct payment from the study group together with the necessary flight documentation or could have canceled the charter flight well in advance of the flight date. Capitol's business decision to operate the flight was its own, and innocent passengers should not be penalized because Capitol made a wrong decision. In short, this case is not as novel or complex as Capitol claims. Rather, it involves a basic question of

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^{6/} It is noteworthy that under the agency agreement Nelson Travel/Friedman essentially agreed to do three things: (1) develop and solicit charter traffic for the flight, (2) prepare necessary documentation for the Board's use, and (3) assure that charterer makes all funds payable to the carrier. However, this was a developed charter on which Nelson Travel/Friedman did no solicitation, and the necessary documentation was never prepared or furnished by Nelson Travel/Friedman. All that Nelson Travel/Friedman was to get its five percent commission for was the collection and transmission of the charterer's payments to Capitol. This was its ultimate job as Capitol's agent under the series of acts ratified by Capitol.

[Tr. 683]

-9-

agency relationships which come within the purview of the Board's charter regulations and fundamental principles of case law.

For the foregoing reasons, the Bureau of Enforcement respectfully prays that the Board deny the Petition for Review of Capitol Airways, Inc.

Respectfully submitted,



Monte Lazarus
Enforcement Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 1967, I served the foregoing Answer to Petition of Capitol Airways, Inc. for Discretionary Review upon the respondent in this proceeding by mailing to it a copy of said answer in a properly addressed, franked envelope, certified mail.



Monte Lazarus
Enforcement Attorney

Washington, D. C.
January 30, 1967

[Tr. 684]

UNITED STATES OF AMERICA

Order No. E-24999

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

SERVED APR 18 1967

Adopted by the Civil Aeronautics Board

at its office in Washington, D. C.

on the 18th day of April, 1967

CAPITOL INTERNATIONAL AIRWAYS, INC.

Enforcement Proceeding

Docket 16370

ORDER DECLINING DISCRETIONARY REVIEW

On December 19, 1966, Examiner Barron Fredricks issued his initial decision in the above-entitled proceeding. Thereafter the respondent (whose corporate name was changed from Capitol Airways, Inc. to Capitol International Airways, Inc. during the pendency of the proceeding) filed a petition for discretionary review of the initial decision and the Bureau of Enforcement filed an answer opposing the petition. Upon consideration of the initial decision and the foregoing pleadings, the Board declines to exercise its right of review.

ACCORDINGLY, IT IS ORDERED:

1. That the petition for discretionary review filed by Capitol International Airways, Inc. be and it hereby is denied; and
2. That the examiner's initial decision shall be effective as the final order of the Board on April 18, 1967 and shall hereafter be identified as Order No. E-24998.

By the Civil Aeronautics Board:

(SEAL)

HAROLD R. SANDERSON
Secretary

PROOF OF SERVICE
I hereby certify that on [Tr. 685]
April 18, 1967
this Document was served
on parties listed below:
/s/ C.E.L.
Service & Mail Clerk

Docket No. 16370

Order No. E-24999

ORDER DECLINING DISCRETIONARY REVIEWCERTIFIED

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Nashville, Tennessee 37217

REGULAR

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Examiner: Fredricks Room-730

Bureau Counsel: Burstein B-50

B-76, B-72, B-52 -
Lazarus

[Tr. 686]

UNITED STATES OF AMERICA

Order No. E-24999

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

SERVED APR 18 1967

Adopted by the Civil Aeronautics Board

at its office in Washington, D. C.

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CAPITOL INTERNATIONAL AIRWAYS, INC.

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By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

BRIEF FOR PETITIONER

CAPITOL INTERNATIONAL AIRWAYS, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD.

United States Court of Appeals
for the District of Columbia Circuit

THEODORE I. SEAMON,
JOSEPH D. SULLIVAN,
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Capitol International Airways, Inc.
700 Woodward Building
Washington, D.C. 20005

FILED OCT 2, 1967

PHILIP A. RYAN
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Nathan J. Paulson
Of Counsel.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner received more than its charter tariff rate by collecting from individual charter participants the difference between the charter price and the amount actually paid to it by the chartering organization, either directly or through its agent (the husband of the president of the chartering organization), who disappeared with his wife after having been entrusted with large sums of money by her on behalf of the charter organization, and was subsequently convicted of larceny of same.

2. Whether Petitioner violated regulations of the Civil Aeronautics Board by operating a charter flight without obtaining certain documents required by those regulations designed to enable the air carrier to determine that the charter conforms to the standards set by the Board, where it was not possible to obtain the documents, there is no allegation that the charter did not meet such standards, and the flight was performed under emergency conditions to avoid hardship.

3. Whether the conclusion that Petitioner violated the Act and regulations is based upon legally sufficient findings and whether such findings are supported by substantial evidence.

4. Whether the imposition of the cease and desist order under the circumstances involved was reasonable and appropriate, within the power and jurisdiction of the Board, consistent with the constitutional and statutory rights, powers, privileges and immunity of Petitioner, an abuse of discretion, legally arbitrary and capricious, or consistent with due process.

5. Whether the cease and desist order is invalid by reason of the scope and breadth of its terms and whether this issue is open for review by the Court.

6. Whether the refusal by the Civil Aeronautics Board to review the Initial Decision rendered by an Examiner was legally arbitrary and capricious, an abuse of discretion, or in violation of the standards adopted by the Board in Section 302.28(a)(2) of its Procedural Regulations [14 C.F.R. 302.28(a)(2)].



IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner.

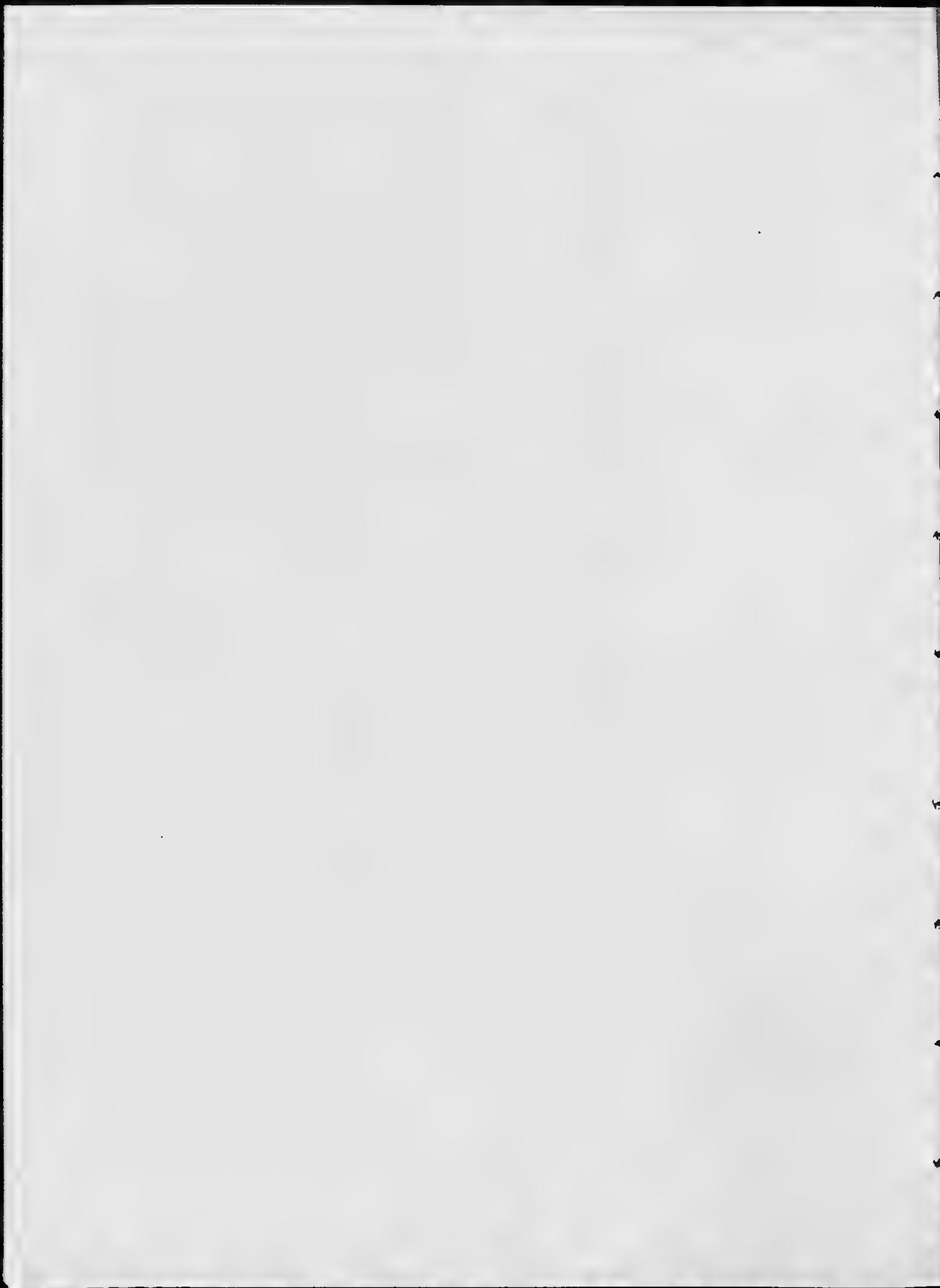
v.

CIVIL AERONAUTICS BOARD,
Respondent

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD.

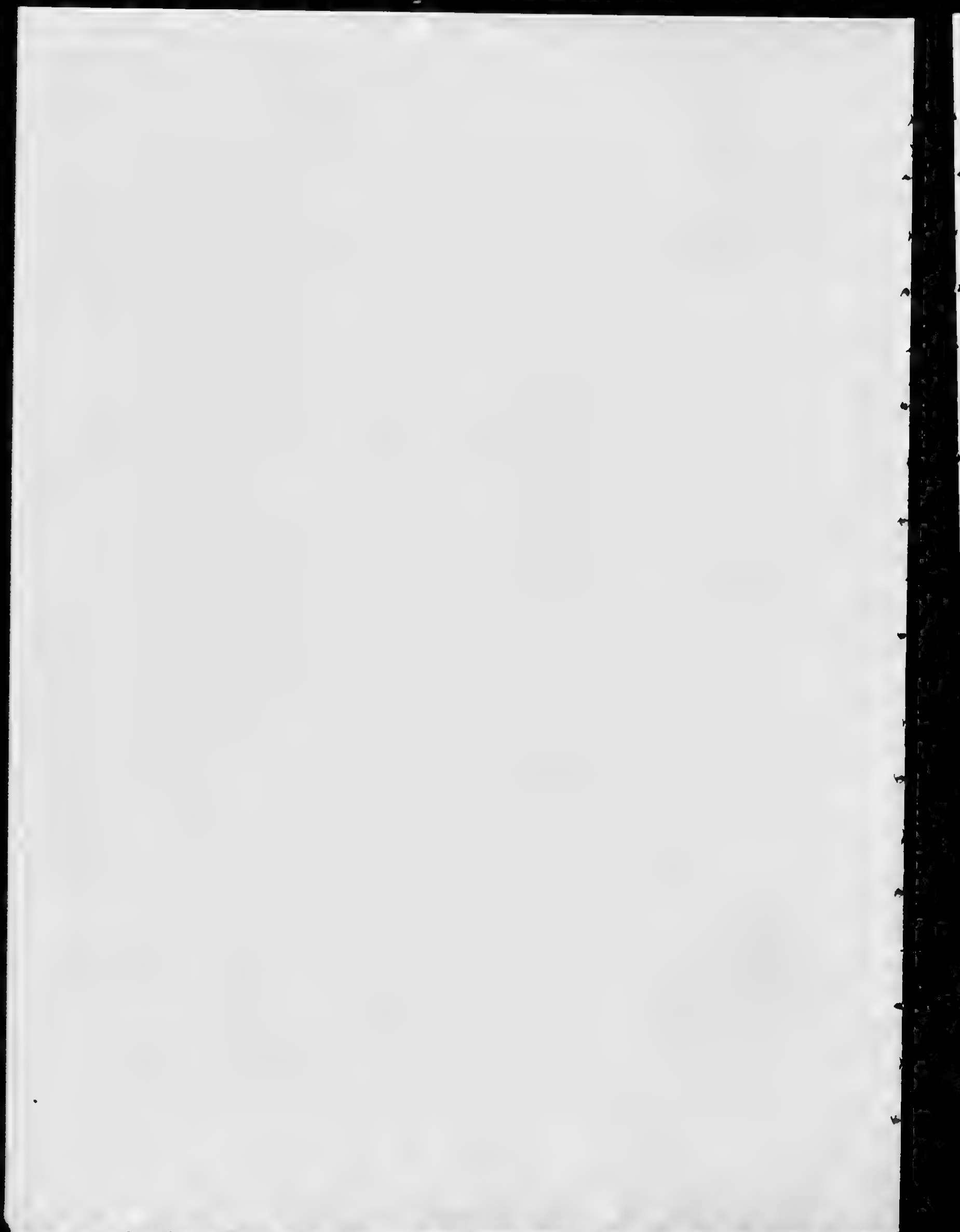
BRIEF FOR PETITIONER

CAPITOL INTERNATIONAL AIRWAYS, INC.



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JURISDICTIONAL STATEMENT

Petitioner, Capitol International Airways, Inc. (hereinafter sometimes referred to as "Petitioner" or "Capitol") is an air carrier holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (the Board) authorizing it to engage in supplemental (charter) air transportation, and in its operations is subject to the jurisdiction of the Board, the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations and requirements of the Board thereunder.

Petitioner seeks review of Order E-24998, adopted by the Board, effective April 18, 1967:

(1) finding that Petitioner in operating a charter flight for New York State Teachers Study Group (a) collected greater compensation for air transportation than that specified in its tariffs and thereby violated Section 403(b) of the Federal Aviation Act of 1958, as amended, 72 Stat. 758, 49 U.S.C. 1373(b); (b) failed to obtain either Section A or B of Part II of the Statement of Supporting Information required by Section 295.12 of the Economic Regulations of the Board, 14 CFR 295.12, in effect at that time; (c) failed to obtain a certified passenger manifest as required by Section 295.35 of the aforesaid regulations, 14 CFR 295.35, and; (d) that the aforesaid acts or omissions constituted violations of the Federal Aviation Act of 1958, as amended; and

(2) ordering Petitioner, its officers, directors, agents, successors, and assigns to cease and desist; (a) from charging, demanding, collecting or receiving a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in Petitioner's effective tariffs; and (b) from operating any pro rata charter flight without obtaining Sections A and B of Part II of the Statement of Supporting Information required by Section 295.12 of the Board's Economic Regulations, 14 CFR 295.12, or without obtaining a certified passenger manifest as required by Section 295.35 of said regulations, 14 CFR 295.35.

Petitioner also seeks review of Board Order E-24999, April 18, 1967, denying its petition for discretionary review by the Board of the Initial Decision by an Examiner and making the Initial Decision effective as the decision of the Board.

The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486 (hereinafter referred to as "the Act") and Sections 702 and 703 of Title 5, 80 Stat. 378 et seq. [formerly Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009].

STATEMENT OF THE CASE

The New York State Teachers Study Group, (hereinafter referred to as the "Study Group"), an association in which membership was open to any teacher in the State of New York, had been engaged since 1961 or 1962 in arranging charter flights for teachers desiring to travel abroad for study or for recreational purposes. Mrs. Sari Friedman joined the Study Group in January 1963 and after serving as treasurer became president in 1964, when the Study Group was incorporated (Tr. 50). The incorporation was arranged by Mrs. Friedman's husband through an attorney whom Mrs. Friedman never met (Tr. 105, 109, 160).

Mrs. Friedman was in charge of all arrangements for charter trips. She was responsible for having solicitation materials printed. Payments by charter participants were sent to her home which she shared with her husband where a record of payments by charter participants was kept under her supervision. Funds received were deposited in the name of the Study Group in a bank account upon which all checks were drawn over her signature (Tr. 55, 58, 62, 66, 71-72, 99, 102, 463-504).

Mrs. Friedman spent most of her working time in connection with her duties as a teacher and did not have sufficient time to negotiate with airlines (Tr. 112) and used her husband Michael Friedman, president of Nelson Group Travel and owner of Nelson Travel Service, since early 1964 when he entered the travel agency business,^{1/} for all the Study Group's business in locating available airlines and making other arrangements for charter trips (Tr. 107-108).

In 1965, the Study Group contracted through Friedman for several charters including a trip to Mexico during the Easter Holiday via Aeronaves de Mexico (Tr. 117-118), a trip to the Orient via World Airways, (Tr. 84), and four trips to Europe during the summer; one via British Eagle Airways, two via Trans International Airlines, and one via Petitioner (Tr. 163-164). According to Mrs. Friedman's testimony, she did not designate the airlines to be used (Tr. 113), but she believed that the carriers for the summer charters as arranged by her husband, were World, British Eagle and Capitol although she later learned that a deposit had been placed with Trans International (Tr. 68-69).

Payments from the money collected from charter participants^{2/} were made by Mrs. Friedman to tour agencies directly or to airlines and to her husband for disbursement to airlines and for advertising and administrative expenses (Tr. 71-72). The payments to Friedman amounting to \$217,873.88 between November 9, 1964 and May 19, 1965 covered a whole variety of purposes including payments for secretarial services, brochures and stamps, stationery,

^{1/} Since Mr. Friedman and the two Nelson companies were to all intents and purposes identical, they will be referred to hereinafter as "Friedman."

^{2/} The Examiner found that the Study Group collected \$53,565 for the July 1 flight of Petitioner (Tr. 627).

cards, letterheads, deposits on hotels as well as payments to various airlines (Tr. 463-504, 630). On each check was a notation on the left front thereof "to list what the check was for and what it covered" (Tr. 77). Mrs. Friedman testified that she funneled the money from the Study Group to her husband to make payments on behalf of the Study Group on various flights for various trips and various other purposes (Tr. 119), and that he had the power to allocate the moneys on behalf of the Study Group (Tr. 120-121). She testified that when she paid her husband, she assumed that the moneys would be paid to the proper parties (Tr. 110-111); that she relied upon him and never distrusted him (Tr. 111); that he acted as her agent in paying moneys to various airlines (Tr. 111); that when a charter agreement was submitted, it was the result of work and services of Friedman on behalf of the charterer (Tr. 114); and that in having Friedman seek out various airlines, negotiate the pricing, etc., it was done on behalf of the charterer (Tr. 116).

Among the checks made out by Mrs. Friedman to her husband were the following:

1. A check for \$3,000, dated 12/31/64, "for additional part payment for Capitol Airways, Inc. for summer charter" (Tr. 474).
2. A check, dated 1/4/65, in the amount of \$933 "for part payment to Capitol Airways, Inc. charter N.Y.-Paris-Rome" (Tr. 477).
3. A check, dated 1/11/65, in the amount of \$5,281 "for part payment to Capitol Airways, Inc. charters 7/1 & 7/2" (Tr. 478).
4. A check, dated 2/1/65, in the amount of \$2,000 "for deposit to Capitol Airways, Inc. two jet charters 1966" (Tr. 481). (Emphasis supplied)
5. A check, dated 2/8/65, in the amount of \$5,000 "for Capitol Airways, Inc. in part payment on 1965 charters" (Tr. 482).

6. A check, dated 3/6/65, in the amount of \$5,000 "for Capitol Airways, Inc. a/c for charter Rome via Paris 7/1-9/3/65" (Tr. 492).

7. A check, dated 3/15/65, in the amount of \$5,000 "for Capitol Airways, Inc. jet charter Rome via Paris 7/1-9/3/65" (Tr. 495).

8. A check, dated 3/24/65, in the amount of \$10,000 "for part payment to Capitol Airways, Inc. charter #2 Rome via Paris 7/1-9/3/65" (Tr. 499).

9. A check, dated 5/19/65, in the amount of \$20,932.40 "on a/c 3-1965 Europe jet charters in Capitol Airways, Inc." (Tr. 503).

In addition to the foregoing checks which the Examiner in the proceeding before the Board found "could be applied only to the July 1 charter," other checks were issued by Mrs. Friedman to her husband purportedly for payments to Petitioner for flights it had not contracted to provide apparently covering other charter flights which had been programmed and negotiated by Friedman with other carriers (Tr. 657-660).

Mr. Friedman testified that the Study Group checks were deposited in the accounts of Friedman and comingled with other funds (Tr. 134, 166), that when he paid a particular carrier, it was impossible to tell whose money was being applied (Tr. 166-167); that his wife trusted him to handle the money for the purposes indicated on the checks (Tr. 161); that he agreed to handle the money accordingly (Tr. 162); and that he was in sole charge of what was paid out (Tr. 163).

The moneys received from the Study Group were applied to the expenses of Friedman's business (Tr. 172) and Friedman deceived his wife who relied upon him in operations of the charters (Tr. 172).

A charter agreement, dated November 6, 1964 for a single round-trip charter flight from New York to Rome via Paris departing on July 1, 1965 and returning from Paris to New York on September 3, 1965 at Petitioner's tariff

price of \$52,331.00 (Tr. 408-9) was made with the Study Group by Petitioner. This agreement which was signed by Mrs. Friedman (Tr. 102) contained the notice: "Make all checks payable to Capitol Airways, Inc."

At the same time an "agency agreement" (Tr. 410) was issued to Friedman by Capitol (Tr. 196-197, 325). The contract as well as the "agency agreement" were both signed by Petitioner after receipt of a deposit in late December 1964 (Tr. 325). The agency agreement (Tr. 410) which provided for a payment of a 5% commission to Friedman, limited Nelson's authority to the July 1, 1965 flight contracted by Capitol, required Nelson to represent the carrier as directed by the carrier, to abide by the regulations of the CAB, and contained a provision:

"Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name."

Although the countersigned charter contract and agency agreement were not delivered to Friedman until after receipt of a deposit equal to 10% of the charter price (Tr. 412), this deposit was returned on January 4, 1965 with the understanding that a check in the same amount would be received directly from the charterer (Tr. 413).

Petitioner received two checks of Friedman, one dated January 11, 1965 for \$5,281 and the other dated February 8, 1965 for \$5,185.20 (Tr. 505-6, 507-8). These two checks amounted to the total of the first two 10% deposits required by the charter contract. On March 5, 1965, Capitol advised Friedman that further payment on the charter flights of \$20,932 was due March 1, 1965 and was delinquent (Tr. 415). On March 31, 1965, Friedman was again advised that payment was delinquent and that attempts should be made to hasten payment (Tr. 416). A further letter reflecting a telephone conversation was sent on

April 30, 1965 (Tr. 417). On May 11, 1965 an acknowledgment of a receipt of a check for \$20,937.40 was made and an extension of final payment was granted to June 1, 1965 (Tr. 418). However, payment was stopped on the latter check (Tr. 419-421) and Capitol was advised that the check had been drawn on the wrong account (Tr. 201-211). On June 10, 1965, acknowledgment was made of the receipt of the Study Group's certified check for \$25,000 deposited to the carrier's account on June 9, 1965. At the same time, Friedman was advised that final payment of \$16,864.80 was due and he was urged that the CAB forms be submitted as soon as possible (Tr. 422-426, 78-92). In this letter (Tr. 422), reference was made to "your group's certified check."

While the payments were late, extension was granted with the approval of Capitol's home office (Tr. 207-208) with almost daily requests for final payments and the CAB forms (Tr. 349). On the weekend before the flight departure neither Mr. nor Mrs. Friedman could be located (Tr. 330, 361). A manifest was obtained from Friedman's office (Tr. 211, 331) and a telegram was sent to each person on the manifest that the flight was in jeopardy due to nonpayment and that a meeting would be held on June 29 at which the addressee's attendance and that of the other officers of the Study Group were requested (Tr. 526). At this meeting approximately 500 persons in lieu of the anticipated 180 appeared (Tr. 214, 281) as well as representatives of the office of the Attorney General of the State of New York (Tr. 229). At this meeting, local New York counsel for Capitol informed the Group that there was a serious problem involved as Capitol had not received full payment as required by its tariff, that the easiest course would be to cancel the flight and refund the money that was paid, but that the airline wanted to do what was proper (Tr. 384, 285-286, 310). The group requested that the flight be operated and offered to make up the balance (Tr. 386). Each member was

permitted to make a payment of a pro rata share of the deficit of payments (Tr. 301) and the flight was operated on schedule (Tr. 363). The other airlines involved cancelled their flights (Tr. 364-365).

Michael Friedman was indicted on July 12, 1965, by the Grand Jury of Bronx County, New York, for first degree grand larceny of some \$165,000 in money belonging to the Study Group and other persons unknown to the Grand Jury. Friedman pleaded guilty to grand larceny in the second degree and was committed to State prison for a term of not less than 4 nor more than 10 years. In a proceeding in which the Attorney General of New York sought an order restraining Michael Friedman, Sari Friedman, Patricia Flanagan, Nelson Group Travel Corp., New York State Teachers Study Group, Capitol and Mitchell from conducting business in a persistently fraudulent and illegal manner. Capitol moved for and obtained an order dismissing the proceeding as to Capitol on the ground that there was no showing that Capitol was in any respect connected with any fraud or illegal acts and practices. A restraining order was issued, however, against the Study Group and Sari Friedman (Tr. 640).

Subsequently, on July 30, 1965, the Bureau of Enforcement of the CAB filed a complaint alleging that (1) the Study Group had collected the entire cost of the charter trip; (2) the funds were transmitted either directly to Capitol or to Friedman; (3) that Friedman had received these funds in the capacity of agent for Capitol; (4) that the collection of the additional sums from the charter participants resulted in Capitol receiving greater compensation for air transportation than the rates, fares and charges specified in its tariff in violation of Section 403(b) of the Federal Aviation Act of 1958, as amended; and (5) that the operation of the flights without obtaining prior thereto certain statements of supporting information and a certified manifest

as required by Sections 295.12 and 295.35, 14 C.F.R. 295.12 and 295.35, of the Board's Economic Regulations constituted violations thereof (Tr. 1-6). Petitioner argued that Friedman was the agent of the Study Group for the disbursement of funds and not the agent of Petitioner for the collection of the charter charges and that it, therefore, acted properly under its tariff and the requirements of Section 295.14, C.F.R. 295.14, of the Board's Economic Regulations, which required the carrier to collect the full amount of the tariff charges prior to operating the flight, in collecting the deficit from the charter participants. It also argued that under the circumstances to require appropriate documentation would have imposed an undue hardship on the innocent charter participants and that under all the circumstances, the Board should not issue a cease and desist order (Tr. 10-18).

Hearing on the complaint was heard before an Examiner of the Board, in which Mr. and Mrs. Friedman were principal witnesses of the Bureau of Enforcement. The Examiner held Petitioner had violated the Federal Aviation Act and the Board's regulations as charged by the Bureau of Enforcement and should be ordered to cease and desist from such practices (Tr. 618-664).

Petitioner filed a petition for review (Tr. 666-674) of the Initial Decision by the Board on the grounds set forth in Section 302.28 of the Board's Procedural Regulations, 14 CFR 302.28, that the Examiner's Initial Decision (1) was based upon erroneous finding of fact; (2) was based upon ultimate legal conclusions clearly contrary to law; (3) involved substantial important and novel (insofar as they relate to Board policy) questions of law, policy and discretion, transcending the instant circumstances, and which required review by the Board.

This Petition was denied by the Board by Order E-24999, dated April 18, 1967, which ordered that the Examiner's Initial Decision be effective as the

final order of the Board on April 18, 1967 and be identified as Order E-24998 (Tr. 684).

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the United States Code, the Federal Aviation Act of 1958, and the Board's regulations thereunder, are set forth in Appendix A. Other pertinent statutory provisions or regulations are cited or quoted in their appropriate place in the text of this brief.

STATEMENT OF POINTS

The Board erred in --

1. Finding that Petitioner collected a greater compensation than that specified in its tariff.
2. Failing to review the Initial Decision of the Examiner.
3. Issuing the cease and desist order under the circumstances here involved.
4. Issuing a cease and desist order of such broad scope.

SUMMARY OF ARGUMENT

The record before the Board did not substantiate, either as a matter of law or fact, that Petitioner directly, indirectly, constructively or otherwise, received greater compensation for the charter flight than that set forth in its tariff. The Examiner relied on erroneous concepts of agency law, and his findings to support his conclusions are not substantiated by, but are contrary to, the evidence and any reasonable inferences which can be drawn therefrom. There is no reasonable showing that Petitioner was responsible in any way for the loss of a large sum of money entrusted to the travel agent husband of the President of the Study Group for the purpose of arranging

charters with other carriers, as well as Petitioner, and obtaining miscellaneous other services on behalf of the Study Group.

Even if Petitioner, on the advice of experienced counsel, had misconstrued applicable commercial law, or in operating the flight without appropriate documentation under emergency conditions to avoid hardships, technically violated the letter of the Act or the Board's regulations, a cease and desist order, especially in the broad terms used, is not appropriate under the circumstances.

In view of the novel questions presented, and the obvious errors of fact and law in a case without governing Board policy or precedent which could impose broad and sweeping liabilities on all charter carriers, the Board erred in failing to review the Examiner's Initial Decision.

ARGUMENT

I.

Friedman Was Not the Agent of Capitol To Collect Funds from the Study Group. Capitol Looked to Friedman as the Agent of the Study Group To Pay the Latter's Obligation to Capitol.

A. Introductory

A crucial finding of the Examiner in this case is the following (Tr. 643):

"The course of dealing between Capitol, Friedman and the study group operates, under the law of agency, to make Friedman's receipt of payments from the study group to be applied to the July 1 charter a constructive receipt by Capitol. The carrier repeatedly, and without protest, accepted and deposited Friedman's agency checks and credited the proceeds to the charter price." (Emphasis supplied)

This appears to be merely another way of stating the rule that payment to an authorized or apparently authorized agent is payment to the principal. This is not disputed as an abstract proposition. The difficulty arises in applying the rule to the facts of this case. Capitol contends that Friedman was not authorized to bind it regardless of whether the matter is viewed under the heading of actual or apparent authority or ratification.

The Examiner's line of reasoning was erroneous in certain major respects. Capitol did not repeatedly accept checks from Friedman. It accepted only two checks from him, as the Examiner was careful to point out in another context (Tr. 635). Apart from this inaccuracy, the Examiner, as will be demonstrated, misconceived the significance of the evidence before him in attempting to apply principles of agency.

A major predicate for the Examiner's conclusion is the significance which he attached to, and the legal consequences which he construed from the fact that Capitol granted Friedman extensions of time for making payments on

its one charter contract. The Examiner's construction is refuted in the full context of the facts. Friedman was found guilty of larceny of \$165,000 of funds entrusted to him by the Study Group for various purposes. The rationale of the Examiner would require attribution to Capitol for making that loss possible, by the fact alone that it granted Friedman extensions of time to make payments on a charter contract totaling only \$52,000 of which Capitol received \$35,000.

B. Friedman Was Not Directly or Impliedly Authorized To Collect for Capitol; nor Did Capitol Make Friedman Its Agent for Collection by "Acquiescence."

At the outset, the Examiner evidences an appreciation of the difficulty involved in finding actual or implied authority. He states that there was prima facie support for Capitol's contention that delivery of a check to Friedman by the Study Group was only a payment to its own agent and not a payment to Capitol. This contention, the Examiner continues, is found in the Charter Contract's direction to "Make All Checks Payable to Capitol Airways, Inc." This provision, the Examiner agrees, placed a duty on the Study Group to inform itself of the limitation of authority set forth in the Agency Agreement that forbade acceptance of funds payable to the agent and required him to obtain from the charterer funds payable to the carrier (Tr. 642).

In this short passage, the Examiner very clearly and accurately delineated the obligation of the Study Group to Capitol and the limitations on Friedman's authority to act for Capitol. The Study Group, by virtue of the contract it made, must pay Capitol directly and is held to knowledge of the correlative provision in the Agency Agreement that the agent is not allowed to accept funds in his own name.

But here all clarity in the Examiner's rationale ends, and misapplication of agency principles begins. The Examiner concluded that the subsequent

course of dealings between the parties so changed the basic framework that in net effect Friedman became Capitol's agent to collect from the Study Group (Tr. 649). In other words, as a result of later events, according to the Examiner, there came about a complete reversal of the role of Friedman.

Surely, such a complete turnaround must be based on substantial evidence. It thus becomes important to examine the "unchallenged evidence"^{1/} that brought about this sweeping change (Tr. 642). The Examiner lists four items of evidence (Tr. 642-643):

(1) It was common practice in the industry for carriers to accept charter payments in the form of checks drawn on the agent's account.

(2) Capitol received checks drawn by Friedman, deposited them to its own account, and credited them as partial payment on the July 1 charter, and

(3) Capitol never suggested to the study group that its remittances must be payable to Capitol's own order, and never communicated directly with the Study Group, but

(4) granted an extension of time based on the judgment that Friedman would pay the charter price.

It is submitted that these items, taken singly or cumulatively, provide no basis in law or fact for the Examiner's conclusion that Friedman evolved into Capitol's agent to collect from the Study Group. These items will be discussed in order and evaluated in terms of their own inherent significance, as well as against the backdrop of other "unchallenged evidence" not mentioned by the Examiner.

^{1/} It is obvious that the fact that evidence is "unchallenged" does not determine its legal significance. What is determinative is the nature and content of the evidence taken in the context of relevant legal principles.

1. Industry Practice to Accept Payments Drawn on Travel Agent's Account, and

2. Receipt of Checks Drawn by Nelson

The fact that in the context of the instant circumstances, and as found by the Examiner, it may be industry practice for the carriers to accept charter payments from the agent, does not operate to make Friedman the agent of Capitol for the receipt and collection of payments due by the Study Group to Capitol. In fact, the contrary is established in this context, with the end conclusion that, even to the extent relying upon industry practice, payments by the Study Group to the agent were made to him as agent for the Study Group, not as agent for Capitol.

The "industry practice," wherein the agent may handle funds entrusted to him by a charter organization would be expected to arise in instances where the agent, as in the instant case, assists the charter organization in many of the details of a charter program, which include arrangements for hotels and ground tour facilities, the determination of and negotiation for aircraft availability, and the necessary bookkeeping, in terms of receiving deposits from the charter group and the disbursement of charter funds for numerous purposes. This is particularly common where the program involves use of several carriers, and where, as in the instant circumstance, the organizer or president of the charter group or groups, as in the case of Mrs. Friedman, is inexperienced in matters of this nature, and relies essentially upon the agent and his experience, facilities and expertise, to take care of all such details. The contract requiring all checks to be made directly payable to the carrier in any event negates any inferences which might be drawn from the fact of any different industry practice, particularly in the circumstances of this case.

The Examiner's reference to and reliance upon "industry practice" was derived from one statement during the course of the hearing that it was industry

practice to accept checks from agents (Tr. 199-200). There is no evidence that it was industry practice to receive payments from the agent as a collecting agent on behalf of the carrier. The conclusion could no less be reached that it was industry practice when receiving payments from the agent to construe, as a matter of fact and as a matter of law, that the funds were being disbursed by the agent for and on behalf of the chartering group and as its agent.

It is true that Capitol did receive two checks directly from Nelson, deposited them to its own account, and credited them as partial payment on the July 1 charter. One, in the amount of \$5,281, was dated January 11, 1965, and the other, in the amount of \$5,185.20, was dated February 8, 1965 (Tr. 633). Acceptance of these checks was not a waiver of the provision that payments be made directly to the carrier, and could in no sense be viewed as an appointment of Friedman as Capitol's agent for collection. The only reasonable inference from the evidence is that Capitol accepted these payments as payments made by a disbursing agent for the Study Group. Any doubt in this regard is eliminated when pertinent parts of Mrs. Friedman's testimony, which the Examiner does not mention, are taken into consideration. She stated unequivocally that she turned over unallocated funds for the Study Group to her husband as her agent to disburse not only to Capitol but to others, including other carriers (Tr. 111-112, 119). He was to allocate the monies to various payees (Tr. 120-121). This testimony is inconsistent with any conclusion that when she paid over unallocated funds to her husband she thought that she was thereby discharging an obligation to Capitol. That could only be done by payment from her agent to Capitol. Her testimony is also inconsistent with any conclusion that when she turned over unallocated funds to her husband she was dealing with him as Capitol's agent for collection. The capstone to all this is her testimony that she trusted him. This is a sentiment not ordinarily experienced in dealing

with the collection agent of another. It is not unusual in one's relations with one's own agents.

3. Failure of Capitol To Insist on Direct Payments and To Communicate Directly with the Study Group, and

4. Grant of Extension of Time to Friedman

What has already been said with reference to Capitol's acceptance of two checks from Nelson is equally pertinent here in assessing the conclusive importance attached by the Examiner to Capitol's failure to communicate directly with the Study Group. Of course, one main purpose in having an agent is to do away with the necessity of direct communication between contracting parties. This is overwhelmingly clear in the present context where the grant of authority from the Study Group to Nelson was so complete. The fact that Capitol granted the extension of time to and through Friedman rather than directly to the Study Group is a further reflection that Capitol, as did the Study Group, viewed Friedman as agent for the Study Group. In effect, Friedman was in complete charge of all the Study Group's charters -- whether with Capitol or other carriers.

A review of Mrs. Friedman's testimony shows the complete discretion, trust and authority vested in Mr. Friedman by the Study Group. Mrs. Friedman testified that she spent most of her working time in connection with her duties as a teacher (Tr. 112); that she did not have sufficient time to negotiate with airlines (Tr. 112); that the problem was to find airlines which had aircraft available (Tr. 107); that she used her husband, President of Nelson Group Travel, because of his greater experience in that field (Tr. 107); that she had used her husband since early 1964 when he entered the travel agency business for all Study Group business (Tr. 107-8); that when she paid her husband she assumed that the monies would be paid to the proper parties (Tr. 110-111); that

she relied upon him and never distrusted him (Tr. 111); that he acted as her agent in paying moneys to various airlines (Tr. 111); that when airlines were contacted, this was done by Friedman (Tr. 113); and that she did not designate any airline (Tr. 113); that when a charter agreement was submitted, it was the result of work and services of Friedman on behalf of the charterer (Tr. 114); that for charter flights in 1965, the Study Group used solely the services of Friedman (Tr. 114); and that the Study Group paid Friedman for various services (Tr. 115); that in having Friedman seek out various airlines, negotiate the pricing, etc., it was done on behalf of the charterer (Tr. 116).

Moreover, Mr. Friedman's testimony showed that he understood clearly the broad authority under which he was permitted to operate for the Study Group. He stated that he was in sole charge of how the money was paid out (Tr. 163).

In view of this testimony of the president of the Study Group and its agent, it is illogical, unreasonable and unsupportable to conclude (as the Examiner did) that lack of direct communication between Capitol and the Study Group (Mrs. Friedman) somehow operated to make Friedman a collection agent for Capitol.

Nor does the Examiner's reliance on the extension of time to Friedman lend support to his Darwinian finding that Friedman evolved from one species of agent to another. If, as the testimony clearly shows, Friedman was in complete charge of arranging various charters for the Study Group, an extension of time to Friedman could only be construed as an extension of time to the Study Group whose affairs he was administering. Indeed, since Friedman was the general agent of the Study Group, entrusted with almost a quarter of a million dollars of its money and charged with arranging multiple charters with a number of carriers of his own selection and providing administrative services for the Study Group, there was no choice but to deal with Friedman directly in granting an

extension of time. Had the matter been brought to the attention of Mrs. Friedman, she could only have said: "Go see my husband." In this practical world, Capitol had no other choice.

Friedman was in complete control of the money and was dealing with other carriers and creditors in addition to Capitol. Since he had the power to establish priorities as between competing carriers (or to steal for himself), and since he had been placed in this position by the Study Group, he was the only person who could make any effective disposition of the moneys. To construe a grant of an extension of time to a general agent for the Study Group in Friedman's position as a grant of authority to collect for Capitol is not reasonable. It was solely a matter of accommodating the Study Group, which had placed their affairs in Friedman's hands.

While the checks received by Friedman bore notations as to purpose, it is clear that he had consistently disregarded such notations before any extension of time was granted. He used the money as he wished and said he completely deceived his wife who had relied upon him (Tr. 172), although it could be inferred that Mrs. Friedman knew or should have known what he was doing (Tr. 172). His deception of his wife resulted in his conviction for grand larceny (Tr. 173). On the record, there can be no doubt that Friedman's deception of the Study Group was operating and the damage had been done or was well on its way to completion before any extension of time was granted. In such circumstances, it cannot be said that Capitol should bear any loss caused by Friedman.

In support of his ultimate finding that payment to the agent was payment to Capitol, the Examiner cites Restatement of Agency 2nd, Section 43, which states inter alia that acquiescence by the principal in the conduct of an agent whose authorization did not include such conduct indicates affirmance. As quoted and underscored by the Examiner (Tr. 643), that section is as follows:

"(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.

* * *

"Comment:

a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal indicates that the parties understood that such acts were authorized, ***. If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as a ratification." (Emphasis supplied).

However, the record is clear that Capitol treated Friedman as the Study Group's agent and not its own in attempting to comply with the regulation requiring full payment before flight time. Against this background, "acquiescence" in his conduct is meaningless or, at best, merely descriptive of the fact that Capitol believed Friedman was having difficulty in making payments for the Study Group and was trying to hasten the process. There is no showing in the record that Capitol at any time knew the amount the Study Group had turned over to Friedman.

Apart from the difficulty in finding factual basis in the record for any "acquiescence" by Capitol in the conduct of Friedman, there is a further difficulty which the Examiner has totally ignored. The clear thrust of Section 43 is that "'acquiescence' indicates an affirmance which normally operates as a ratification." (Emphasis supplied by Examiner) The power of Friedman to bind Capitol, according to the Examiner, does not, then, stem from any direct grant of authority to him but rather from Capitol's alleged

ratification after Friedman had acted. The difficulty with finding ratification here is that Friedman in dealing with the Study Group never purported to act for Capitol. Mrs. Friedman testified that Friedman was her agent. This is fatal to any application of ratification. The law is clear that there can be no ratification unless Friedman purported to act for Capitol in dealing with the Study Group. How clear this rule is may be seen from Section 85 of the Restatement of Agency 2nd, (to which the Examiner does not refer):

"Ratification does not result from the affirmance of a transaction with a third person unless the one acting purported to be acting for the ratifier."

The New York cases are to the same effect. See O'Connor v. Bankers Trust Co., 159 Misc. 920, 289, N.Y.S. 252 (1936), aff'd 253 App. Div. 714, 1 N.Y.S. (2d) 641, aff'd 278 N.Y. 649, 16 N.E. (2d) 302. See also Restatement of Agency 2nd, Reporter's Notes to Section 85, Vol. 3, p. 147.

In addition to Section 43 of the Restatement of Agency 2nd, the Examiner cites the following case authorities:^{1/}

(1) Ramsay v. Miller, 202, N.Y. 72, 95 N.E. 35 (1911), (Ex. Dec. 24).

This case is cited for "relevant principles of ratification." The quotation from the case (Tr. 644-645) makes it clear that ratification is properly found only where "one has assumed to act as agent for another." This conforms to the Restatement view discussed above. The case therefore is of no significance since, as pointed out above, there is no showing in the record that Friedman purported to act for Capitol in dealing with the Study Group. Ramsay, on the

^{1/} Some of the cases deal with apparent authority and ratification as well as acquiescence but are collected and analyzed here for the convenience of the court. Brief separate treatment is given to apparent authority and ratification hereinafter.

other hand, involved a situation where the agent, who exceeded his authority in buying stocks, clearly was an agent for just that purpose.

(2) Bronson's Executor v. Chappell, 79 U.S. 681, 20 L.Ed. 436, (1870), (Tr. 645). This is cited for the proposition that payments made to an agent who lacked authority to receive them are chargeable to the principal who acquiesces in the agent's receipt of payments. Factually, however, the case involved, as the court found, actual written authority to receive the payments. Alternatively, the court found that, if the agent was not in fact authorized, the evidence was sufficient to show the other contracting party was justified in believing that the agent did have authority. The agent had, in effect, been held out as a general agent with unlimited authority to collect. In the absence of any manifestation running from Capitol to the Study Group that Friedman had authority, this case is of no value. See Restatement, Section 27, and comment thereon, infra.

(3) Hoiden v. Kohout, 12 Ill. App. (2d) 161, 138 N.E.(2d) 852 (App. Ct. 1956); Scott v. Continental Assurance Co., 167 Ohio St. 515, 150 N.E.(2d) 38 (1958); Cox v. Pearce, 112 N.Y. 637, 20 N.E. 566 (1889). This cluster of cases is also cited for the proposition that payments to an agent not authorized to receive the same were, in effect, payments to a principal who had acquiesced in similar transactions.

But in Hoiden there was a clear grant of authority in the agent to collect. Indeed, the trust deed which plaintiff (principal) sought to foreclose clearly stated that payments could be made to the trustee's office (agent). There is no such grant of authority here.

The Scott case held that payment of insurance premiums to an insurance agent over a period of fourteen years rather than to the home office of the insurer (as requested by the policy) constituted payment to the insurer. This case

is in no way analogous or controlling. The agent in Scott was not the agent of the plaintiff (the insured) but only of the company. Here, on the other hand, Friedman was the Study Group's agent before Capitol came into the picture. The same observation can be made of Cox.

(4) Reusche v. California Pacific Title Insurance Co., 42 Cal. Rptr. 262 (1965). There is no disagreement with the general language which the Examiner quotes from the opinion in this case. As applied to the present problem, however, the quoted language favors Capitol rather than the Study Group because (as noted before) it is quite clear on the record that Friedman was the agent of the Study Group for many purposes before he dealt with Capitol. The Study Group, not Capitol, placed him in a position to commit the fraud.

Additionally, the Reusche case turns on direct communication between the parties to a transaction initiated by the agent. This communication took place before the transaction went into effect. There are no similar facts here. There never was any communication between Capitol on the one side and Mrs. Friedman and the Study Group on the other.

(5) Lind v. Schenley Industries, Inc., 278 F. (2d) 79 (C.A. (3rd) 1960), is cited for its generalized definitions of actual, apparent, and implied authority. The case does not involve payment to an agent. Rather, it involves the authority of a corporate official to bind the corporation to pay commissions to a sales manager. It is of no help whatsoever in answering the purely factual questions involved here, viz., (1) did Capitol actually authorize Friedman to collect for it or did Capitol at all times deal with Friedman as the agent of the Study Group? (2) did the Study Group at all times deal with Friedman as its agent and not as the agent for Capitol? (3) did Friedman to the Study Group's knowledge ever purport to act for Capitol? and (4) did Capitol ever hold out Friedman as its agent to collect?

It is submitted that a review of the record requires that these questions be answered in Petitioner's favor.

(6) Schaffner v. N.Y. Trust Co., 34 N.Y.S. (2d) 537 (App. Div. 1942).

Even if a limited relevance is conceded to this case, the Examiner's treatment of it misses the point. He states that unlike Schaffner "the Study Group had reached no private understanding with Friedman." Regardless of its privacy, it is clear that there was an agreement and a firm relationship. As Mrs. Friedman testified, he was employed, inter alia, to pay Capitol, supra. This he did not do.

The court in Schaffner wisely pointed out that it was presented with an unique set of acts for which there apparently was no case in point. The same observation can be made here. As Capitol is at continuing pains to point out (see discussion of Lind v. Schenley Industries, Inc., supra), what is involved here are purely factual questions which must be properly resolved before any particular principle or principles of agency can operate thereon to produce a legal result. Capitol submits that the evidence in the case was misconceived and has no probative force to reach the findings and conclusions embraced in the Examiner's Initial Decision.

C. Friedman Did Not Have Apparent Authority To Collect for Capitol.

The Examiner concluded that the Study Group was "entitled. . .to believe that Friedman had full power to collect in behalf of the carrier." This is founded on his notion of apparent authority.

No exegesis of the principles of apparent authority is necessary here. All would agree with the Restatement of Agency 2nd, Section 27, that:

" . . .apparent authority to an act is created as to a third person [Study Group] by written or spoken words or any other conduct of the principal [Capitol], which

reasonably interpreted, caused the third person [Study Group] to believe that the principal [Capitol] consents to have the act done on his behalf by the person purporting to act for him."

Comment (b), subjoined to this Section, is illuminating:

" . . . apparent authority only exists as to those who learn of a manifestation from conduct of the principal for which he is responsible. . . . Until there has been a communication to a particular person, and until that person learns facts from which he reasonably infers that the agent is authorized, there is no apparent authority as that word is here used. Thus, if the agent has the reputation in the community of having authority so that to all the persons in the community he would have apparent authority, he nevertheless has no apparent authority as to a stranger who does not know of the reputation or past conduct of the agent."

Applying these principles to the evidence, it is clear that there was no apparent agency (authority) to collect. Mrs. Friedman and the Study Group were not misled. She was the only witness on behalf of the Study Group who testified concerning the activities of her husband. Her testimony is utterly devoid of any statement that Capitol in any manner, shape or form led her to believe that her husband was its agent to collect from the Study Group. Indeed, her testimony does not even reveal that she knew her husband had entered into the limited agency agreement with Capitol. She knew nothing about the matter. She never had any personal contact with any employee of Capitol (Tr. 92). Nor does her testimony reveal that she ever saw, read or knew of the existence of any written communications between her husband and Capitol.

Absent any manifestation from Capitol to her that her husband was authorized to act for it, there could be no reasonable reliance on her part -- indeed, no reliance at all. She dealt with her husband as agent for the Study Group and left it up to him to select the carrier and trusted him completely (Tr. 111-116). In a word, her entire testimony is totally inconsistent with the Examiner's finding quoted above.

D. Capitol Did Not Become Liable by Virtue of Ratification.

Ratification, as the Examiner correctly points out, is only applicable where the agent "has assumed to act as agent for another."^{1/} As pointed out above, the record is devoid of any showing that Friedman in receiving funds from the Study Group assumed to act as a collection agent for Capitol. In his dealings with the Study Group, he at all times assumed to act for it and not for Capitol. Mrs. Friedman was quite clear on this (Tr. 107-116). There is no evidence to the contrary.

Moreover, "ratification" to be binding must be made with knowledge of the facts. Capitol did not know how much Friedman had received from the Study Group. That being so, its dealings with Friedman could in no sense be considered a retroactive approval of an act of which it was ignorant, Restatement of Agency 2nd, Section 91.

II.

Assuming, Arguendo, That Friedman Was the Agent of Capitol To Collect from the Study Group, His Embezzlement Is Not Traceable to That Function but to His Authority as Agent for the Study Group To Receive Its Funds and Make Proper Disbursements.

It is clear, as Mrs. Friedman testified, that her husband was the agent of the Study Group to make payments to Capitol and others on its behalf (Tr. 111). If, improbably, but for the sake of argument, he is at the same time held to be the collection agent for Capitol, the question arises as to which should bear the loss.

^{1/} The Examiner cites and quotes from Ramsay v. Miller, 202 N.Y. 72, 95 N.E. 35 (1911) (Tr. 644-645); Accord, Restatement of Agency 2nd, Section 85.

The Examiner, after concluding that Friedman was the Study Group's agent to collect (Tr. 644), observes that he was also the Study Group's agent to pay Capitol (Tr. 650). The significance of the dual roles played by Friedman, however, is not commented upon. It is merely assumed that Capitol is responsible. But it is quite clear that the ability to cause the loss is directly attributable to the Study Group. Friedman had that group's complete faith and trust, as his wife testified. No restrictions were placed upon him. On the other hand, as the Examiner notes in another connection, Capitol insisted upon certified payment (Tr. 634). The loss, therefore, must be borne by the Study Group. It alone made Friedman its disbursing agent and entrusted the funds to him. There was no way for Capitol to prevent his defalcation.

III.

The Decision Is Not Supported by and in Accordance with
Reliable, Probative and Substantial Evidence.

Section 556(d), Title 5 of the United States Code, 80 Stat. 378, et seq., formerly Section 7(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006, provides:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

As Mr. Justice Frankfurter stated in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) which 4 Davis, Administrative Law Treatise, (1958) Section 29.02 cites as the "key case" since the enactment of the Administrative Procedure Act:

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

While principal issues in this proceeding revolve around mixed questions of law and fact, the Examiner in order to reach his conclusions had to make certain factual findings. These findings, which might be better termed assumptions or conclusions, are not supported by any evidence, but rather are contrary to the evidence adduced during this proceeding.

The following eight examples of conclusions by the Examiner demonstrate that the findings of the Examiner are not legally sufficient, are not based upon evidence of record, are contrary to the evidence, or based upon pure speculation.

1. "The study group had collected more than the full price of Capitol's July 1 charter and Friedman had received from the study group, in the form of checks allocated to or allocable to the July 1/September 3 commitment, a total of \$57,146.40." (Tr. 630)

Even if all the checks issued by Mrs. Friedman to Friedman are assumed to accurately reflect the purpose for which the payments were made, the evidence does not support the conclusion that the full charter price for the July 1 charter trip was paid to Friedman. The evidence shows that only three checks, amounting to a total of \$20,000, were designated by Mrs. Friedman to be applicable to the July 1, 1965 charter for which Capitol contracted. The other six checks relied upon by the Examiner to support his conclusion that the Study Group paid Friedman for the entire cost of the trip, included two checks (Tr. 474, 482) noted to apply to charters by Petitioner even though the Examiner found there was only one charter flight contracted by Capitol; a check (Tr. 478) for charter flights by Petitioner on July 1 and July 2, even

though Petitioner had not contracted for any flight on July 2; a check (Tr. 481) purportedly for deposit on two charter flights by Petitioner in 1966; a check (Tr. 503) on 3 Europe jet charters by Petitioner subject to the same problem as above; and a check (Tr. 477) for \$933 related to a "N.Y.-Paris-Rome" charter by Petitioner, which is probably the only one of the six inapplicable checks which could be attributed to Petitioner's flight in the absence of other evidence.

The Examiner reached his conclusion that the Study Group paid Friedman \$57,146.40 (or more than the charter price for the July 1, 1965 flight and more than the Study Group collected from the charter participants) by arbitrarily selecting from the evidence checks which cannot be attributed to the July 1, 1965 flight.

Obviously, the notations on the checks are meaningless, since the Examiner found (Tr. 630), that despite the fact the Study Group understood Capitol was to operate three charter flights, the record shows that Petitioner contracted only one.

Furthermore, this conclusion is at war with the undisputed fact that the Study Group issued a certified check payable directly to Petitioner for \$25,000 (Tr. 83-92, 426). This would mean that the Study Group paid for the Capitol charter \$82,146.40 out of collections of only \$53,565 collected (Tr. 627). In fact, the Examiner concludes (Tr. 631) that Friedman had \$46,680.20 out of which to satisfy the \$16,864.80 charter price deficit in mid-June.

Such illogical assumptions are pure speculation, not supported by any reasonable inference or by any reliable and probative evidence. In this regard, it must be borne in mind that Mrs. Friedman signed the charter contract, which called for specific payments of \$5,233.10 on signing the contract,

\$5,233.10 within 60 days, \$20,932.40 on March 1, 1965, and the balance of \$20,932.40 on May 1, 1965 (Tr. 624-625). Thus, this finding is illogical and defies reason. The Bureau of Enforcement which had the burden of proof as the proponent of the cease and desist order, never made any attempt to and did not prove by direct evidence that the Study Group paid Friedman the full July 1 charter price even less the \$25,000 paid directly to Petitioner. There is absolutely no evidence that Mrs. Friedman ever paid any such amounts to Friedman for the July 1 charter.

2. "Capitol, if it had been disposed to insist upon observance of the schedule of payments set out in the charter agreement and the requirement that the study group remit directly to Capitol's order and not to the travel agent, could have secured full payment by May 1, sixty days in advance of the departure date, or in default of such payment could have cancelled the charter and put its plane to some other profitable use." (Tr. 631-632)

This conclusion is sheer speculation not supported by any evidence except as to the latter alternative and amounts to the ex post facto substitution of the Examiner's judgment. While there is a strict requirement for observance of tariffs and that the full charter price, or a satisfactory bond therefor, be collected prior to departure (Section 295.14(e) of the Board's Economic Regulations; 14 CFR 295.14(c)), there is no Board regulation or policy requiring dealing with groups on such a stern basis. In fact, in view of the fact that the Study Group had put up the bulk of the charter price, we believe that the Board would actually have looked with disfavor on cancellation of the flight.

The conclusion that the carrier should have attempted to deal directly with the group finds no support in the record. Mrs. Friedman, the person in charge of arrangements for the group, testified that she did not have time and relied upon her husband to handle all arrangements. All the evidence requires

the conclusion that it would have been of no avail to approach Mrs. Friedman and there is no evidence of any other person in the Study Group able to take any action, supra.

3. "Instead of treating Friedman as the study group's agent and demanding payments on the dates provided, Capitol consistently looked to Friedman as its only means of obtaining payment and never attempted any direct communication with the study group. A series of letters evidences the carrier's contacts with Friedman and shows continuing effort by the carrier to obtain payment and continuing delay and evasion by Friedman." (Tr. 632)

This conclusion from this finding is not supported by the evidence.

The summary of the continuing efforts outlined by the Examiner (Tr. 632-635) shows that Petitioner made diligent efforts to secure payment and the necessary documentation, and that Petitioner did in fact deal with Friedman as agent for the group. In fact, as the Examiner noted (Tr. 634), Petitioner's representative, in writing to Friedman as late as June 10, 1965, referred to the Study Group as "your group's." The grant of extension of time to Friedman does not negate that Petitioner dealt with him as agent for the group. In fact, the letter of March 31, 1965 to which the Examiner refers (Tr. 633) indicates that failure to insist on timely payment was for the accommodation of the Study Group. Indeed, the record shows, if we assume arguendo that the specific checks upon which the Examiner relies, could have been applied to the July 1 charter, that the Study Group had paid Friedman a total of only \$16,274 prior to March 1, 1965, the date on which the third payment of \$20,932 was due in addition to prior payments of \$10,466.20, so that the Study Group was behind by more than \$15,000 in its total payments for the July 1 charter. As noted above, there is no evidence that efforts to communicate directly with the Study Group would have had any result, but referral to Friedman.

4. "By the charter agency agreement Capitol selected Friedman as its agent for the purposes stated in the agreement and its acquiescence in Friedman's conduct in accepting study group checks drawn to his order and depositing them in his agency account worked a redefinition of his authority that entitled the study group to believe that Friedman had full power to collect in behalf of the carrier." (Tr. 647)

The conclusion is not only clearly not supported by, but contrary to, the evidence. The record is clear that Friedman was selected by the Study Group or Mrs. Friedman. There is no evidence that Friedman ever held out or caused the Study Group to believe that he was authorized to collect on behalf of the carrier. Nor is there any evidence whatsoever that the Study Group, in fact, believed, or was under the impression that Friedman had power to collect on behalf of the carrier. The evidence is directly contra. Mrs. Friedman specifically testified that her husband was her agent for disbursement of funds and that she relied upon him to act on behalf of the Study Group. The evidence shows, and the Examiner found, that Mrs. Friedman had no contact with any employee of Petitioner but handled all arrangements through Friedman (Tr. 631); and that Petitioner never attempted direct communication with the Study Group (Tr. 632, 642).

5. "Friedman had wronged the study group at least to the extent of failing to arrange with Capitol for operation of the projected 7/2-9/4 and 7/4-9/5 charters. . . . The study group had reached no private understanding with Friedman." (Tr. 649)

While this conclusion is not determinative of the outcome of this proceeding, it is another example wherein the Initial Decision ignores the evidence. There is no evidence that the Study Group ever requested Friedman to secure the services of Petitioner for the referenced flights. In fact, Mrs. Friedman specifically testified that she did not designate any airline and that her husband's services were employed, inter alia, to find any carriers which had equipment available.

The conclusion that there was no private arrangement between the Study Group and Friedman is simply at war with the entire record.

6. "Upon the uncontroverted evidence, Capitol knew that Friedman was receiving remittances from the study group, commingling them with his own funds. . . ." (Tr. 649)

There is no evidence in the record that Petitioner in any way knew how the funds were being handled. While it might properly be inferred from the fact that Friedman transmitted funds to Petitioner that he received funds from the Study Group or charter participants, there is no evidence as to knowledge by any representative of Petitioner as to the arrangement between the Study Group or the charter participants or how the funds collected from charter participants were handled.

7. "Nevertheless Capitol gave Friedman carte blanche to complete collection of the charter price. When Friedman received payments from the study group for the contracted July 1 charter he was the carrier's agent for collection. It follows that Capitol constructively received the full price of the July 1 charter out of the moneys that the study group paid Friedman for charters to be operated by Capitol." (Tr. 649) (Emphasis supplied)

There is a complete lack of any evidence that Petitioner gave Friedman any authority to collect on behalf of Petitioner. Petitioner dealt with Friedman as the representative of the group and repeatedly urged that payments be made to Petitioner, not that he collect on behalf of Petitioner. Petitioner accepted checks only made payable to Petitioner. There were no checks accepted or otherwise made payable to Friedman as agent for Capitol and no checks payable to Friedman endorsed to Petitioner.

The conclusion that when Friedman received payments from the Study Group for the contracted July 1 charter he was the carrier's agent for collection, is clearly not supported by the evidence. As the Examiner pointed out, there

were only three checks specifically issued by Mrs. Friedman to Friedman on behalf of the July 1 charter totalling \$20,000.00 (Tr. 630). None of these checks were in amounts specified in the schedule of payments. The Examiner's effort to attribute miscellaneous checks, as noted above, as moneys constructively received by Petitioner is completely arbitrary since there is no evidence that the writer of the checks delivered those checks or even the checks specifically designated for the July 1 flight, in the belief that payment to Friedman was payment to Capitol. Control of the distribution of the funds given to Friedman by the clear uncontroverted evidence remained in the Study Group, except to the extent that Friedman was granted discretion to allocate the funds for the purpose of the Study Group on behalf of the Study Group.

Indeed, the Examiner's reference to "charters" (plural) to be operated by Capitol, would infer that in his opinion Capitol constructively received moneys in connection with flights that it never contracted to operate, for which the Study Group had no charter agreement and for which Petitioner had no arrangement of any sort with Friedman. This is in conflict with the Examiner's own finding and the evidence that Petitioner contracted to operate only one flight (Tr. 630). Certainly, a misunderstanding as the flights contracted for as a result of a lack of communication between Mrs. Friedman and her husband, employed by the Study Group to obtain carriers, could not transform transactions between the two into relationships with Petitioner without some act on behalf of Petitioner, of which the record is devoid of any evidence.

8. "The study group. . .received by clear implication Capitol's manifestation of authority in Friedman to collect as Capitol's agent and in Capitol's behalf. Subsequent payments from the study group to Friedman were made pursuant to that manifestation and under the assurance that Capitol acquiesced in Friedman's receipt of payments in its behalf." (Tr. 651-652)

This finding is not supported by and contrary to the evidence. The Bureau of Enforcement which, as proponent of the order had the burden of proof, produced both Mr. and Mrs. Friedman as their principal witnesses. Mrs. Friedman unequivocally testified that her husband made payments on behalf of the Study Group. There is nothing whatsoever in her testimony that she received any manifestation or relied on any manifestation that Friedman had authority to collect for Petitioner or that she relied on any acquiescence or other act or failure to act by Petitioner in making payments to Friedman.

In this regard, the Examiner found (Tr. 651):

"Unquestionably the charterer reposed trust in the travel agent and the latter was agent and fiduciary of the charterer."

In effect, the Examiner states that because the Petitioner recognized the relationship between the Study Group and Friedman, a relationship not prohibited by any law, regulation of the Board or otherwise, the mere recognition and acceptance of the relationship by Petitioner changed the relationship between the other two parties and the intent and results of those relationships. But the record does not show any evidence to sustain any conclusion that the Study Group, Mrs. Friedman, or Mr. Friedman relied on or even contemplated any such change in relationships. The record is clear that from beginning to end both Mr. and Mrs. Friedman intended and acted in accord with that intent, that Friedman was to disburse money on behalf of the Study Group and was free to deal with the moneys entrusted to him in the interests of the Study Group. There is not even a scintilla of evidence that payor or payee ever considered that payment to Friedman was payment to Petitioner or that Friedman had any duty to Petitioner with respect to funds entrusted to him.

IV.

The Cease and Desist Order Should Be Set Aside
as Inappropriate or at Least Substantially Modified.

Section 1002(c) of the Act, 72 Stat. 788, 49 U.S.C. 1482(c)

provides:

"If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith." (Emphasis supplied)

The Board has on numerous occasions rejected the contention that the language of Section 1002(c) of the Act makes it mandatory upon the Board to issue cease and desist orders whenever it finds that violations of the Act have occurred. It has pointed out that the issuance of a cease and desist order rests squarely within the discretion and judgment of the Board and depends upon public interest considerations in the light of the facts and circumstances of the individual case. Shulman, Inc. Enforcement Proceeding, 30 C.A.B. 216, 220 (1959)

Thus, the Board has declined to take enforcement action, for example, where the incident has not been a continuing one but represents only one or two occurrences over a long period of time. Slick Airways, Inc. v. American Airlines, 25 C.A.B. 808 (1957); where the conduct does not represent a course of regular and frequent recurrent activity, American Shippers, Inc. v. Shulman, Inc., Order E-14886, February 1, 1960; City of Brownsville, et al., v. Pan American, Order E-16543, March 21, 1961. In Broward County, Florida v. National Airlines, Inc., 35 C.A.B. 524 (1962) the Board decided a cease and desist order would not be issued when the carrier acted in good faith and on the advice of counsel.

In Oregon-Washington Plywood Co. v. F.T.C., 194 F. (2d) 48, (CA. 9th 1952), the 9th Circuit held in setting aside a cease and desist order that: "The propriety of such an order in any particular case must depend on a consideration of all the surrounding facts and circumstances" The court in that case cited with approval the standards applied by the 7th Circuit in Eugene Dietzgen Co. v. F.T.C., 142 F. (2d) 321 (C.A. 7th 1944), cert. den. 323 U.S. 730, 65 S. Ct. 66, 89 L. Ed. 585 (1944). In the latter case, although the court upheld the cease and desist order involved, it stated:

"The propriety of an order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary."

While the Examiner quotes (Tr. 642) from American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 76 S. Ct. 600, 100 L. Ed. 953 (1956), a portion of that quote is particularly applicable here:

"We decide only whether in determining what is the public interest the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." (Emphasis supplied)

The courts have also found that while agencies have discretion in issuing cease and desist orders, the discretion residing in the agency is a reasoned discretion. Oregon-Washington Plywood Co. v. F.T.C., supra. In addition, there must be some relation between the facts found and the breadth of the order. Swanee Paper Corp. v. F.T.C., 291 F. (2d) 833 (C.A. 2nd 1961).

Even if all the Examiner's findings and conclusions were to be adopted, there is absolutely no evidence or findings as to any injury to the public interest, or of a continuing series of violations. The incident was an isolated incident without precedent in the company's experience (Tr. 364) and

totally unanticipated. Nor is there any showing of willful or other intent to violate or disregard the Act or any Board regulation. The circumstances involving the collection of the deficit indicated not a disregard of the carrier's tariff, but rather an intent to adhere thereto and to fully comply with the requirements of Section 295.14(e) of the Board's regulations (14 CFR 295.14 (e)), which requires:

"That carriers shall require full payment of the total charter price or the posting of a satisfactory bond for full payment prior to the commencement of the air transportation."

The question involved in the collection of the deficit was a question of commercial law resulting from relationships between persons who had disappeared at the time and of which the carrier had little knowledge, but it was obvious that the amounts involved exceeded that owing to Petitioner.

Similarly, with regard to the documentation, the record shows that Petitioner made repeated requests for the statement of supporting information and did actually obtain a manifest from Friedman's office which enabled it to contact the charter participants. As the Examiner noted (Tr. 622-623), these requirements for documentation (Section 295.12, 22, 35 and 36, (14 C.F.R. 295.12, 22, 35 and 36)) were designed to enable the air carrier to determine that the charter conformed to the standards set by Part 295. The Bureau of Enforcement called as witnesses four participants in the charter flight. According to the testimony of these witnesses, they were all teachers in the New York schools and bona fide members of the Study Group. No evidence was adduced as to any irregularity in the flight, the carriage of unauthorized persons, or that the flight was in any way improper under the standards of Part 295, nor is there any such issue in this proceeding.

The record also shows that at the time the decision was made to operate the flight at the request of the charter participants, two Assistant Attorneys General of the State of New York were present. As one of these gentlemen testified:

"We are concerned with the protection of the public in seeing that people aren't stranded, that flights take off that are paid for, and people are not defrauded." (Tr. 249)

As is apparent from the subsequent proceedings brought by the State of New York against Capitol and others involved in the instant charter flight (subsequently dismissed as to Capitol), there was a public interest factor, at least in the eyes of the State of New York, that the passengers not be stranded. In fact, the presence of the state law enforcement officials clearly constituted a measure of force majeure.

Under all these circumstances, including the fact that Capitol did obtain a manifest from Friedman's office which permitted them to get in touch with the charter participants, the fact that there is no evidence whatsoever that the flight did not fully comply with the requirements of Part 295, that it was impossible in view of the disappearance of Mr. and Mrs. Friedman to obtain certifications from them, that there is no evidence that any other person could have certified the required documents, and that there was at least implied, if not actual, pressure upon Petitioner not to strand the innocent passengers by cancelling the flight, no public injury resulted from the operation of the flight by Petitioner, but rather further injury to the charter participants was averted.

The Examiner did not find any public injury. The only grounds stated for issuing a cease and desist order against Capitol is that the alleged tariff violation stemmed from Capitol's alleged acquiescence in Friedman's

acceptance of check payable to Friedman's order, from Capitol's prolonged failure to require punctual payment of the charter price, thus enlarging Friedman's opportunity to misapply the funds entrusted to him for that purpose and from Capitol's ultimate decision to obtain additional money covering the deficit from the tour passengers (Tr. 652). Even if Capitol had acquiesced in Friedman's acceptance of checks payable to Friedman's order, there is no rule or regulation, or other provision which condemns such conduct. The extension of time to make payments of the charter price does not violate any public interest standard since the only requirement is that the carrier receive full payment, or a bond therefor, prior to departure. As noted above, Capitol's decision to collect the deficit from the tour passengers was in an effort to comply, on the basis of advice of counsel, with the requirements of its tariff and the requirements of Part 295.

In essence, the only reason cited by the Examiner for issuance of cease and desist provisions relating to the documentation is that a violation did occur and that Capitol might have avoided the situation.

None of these factors show that the public interest will be advanced by ordering Capitol to cease and desist from the alleged activities. The ultimate gravamen of a finding that a cease and desist order should be issued is that Petitioner should have collected the full payment for the charter flight well in advance of the departure date. There is no such public interest standard. The standard, set forth by the Board itself in Section 295.14(e), supra, is that the price be paid prior to departure. Thus, there is no basis in the record of this proceeding for issuing a cease and desist order to Petitioner.

Although the Examiner finds in regard to the alleged tariff violation only that Petitioner collected a greater compensation for air transportation

than the fares [sic]^{1/} specified in its tariff, the provisions of the cease and desist order direct Petitioner to cease and desist from charging, demanding, collecting or receiving a greater or less or different compensation for air transportation or for any service in connection therewith than the rates, fares and charges specified in said air carrier's effective tariffs.

Thus, while the gravamen of the alleged violation in this regard is related to extremely limited and peculiar facts as to the liability under commercial law of a carrier for an act of an agent, the cease and desist order would in fact order Petitioner to cease and desist from any violation of Section 403(b) of the Act. Thus, the scope of the order is not related to the facts involved but is a blanket injunction against the carrier. It is thus clearly inappropriate and even if not set aside in its entirety, should be substantially modified to relate to the specific violation which was alleged to have been incurred.

Similarly, the injunction with regard to the documentation is extremely broad and would place substantial unwarranted burdens on the carrier which may well be contrary to the public interest. Under the order, the carrier would be precluded, subject to penalties, from operating any transatlantic charter flight without the documentation, no matter what the circumstances. This would mean that the carrier would be forced to cancel any charter flight upon which it did not receive documentation, regardless of the circumstances. As the record in this case shows, there are numerous changes in charter participants up to nearly the date of departure and it is impractical to obtain

^{1/} As a technical matter, the \$52,331 was not a "fare" but rather a fixed charter charge.

the certified passenger manifest, in particular, at least until shortly before departure. The principal purpose of the manifest is to assure that the participants in the charter are bona fide members of the charter organization or members of their immediate families. It is necessary in the carrier's discretion, with the assumption of the risk of committing a violation, if any unauthorized person is carried, to use other means of verifying the bona fides of the passengers. Under the cease and desist order this would be impossible and the entire flight would have to be canceled, presumably at the last minute, with substantial hardship to the traveling public and disruption to long and well-laid plans. In fact, this underscores the inappropriateness of the cease and desist order in and of itself. In this regard, the Examiner's entire rationale seems to be directed to the proposition that charter carriers should cancel flights at the slightest provocation. He does not point to any such standard espoused by the Board and indeed cannot. As noted in the quote from American Airlines v. North American Airlines, supra, cited by Examiner, the criteria espoused by the Board include the convenience of the traveling public and protection of public reliance on carriers. It must be noted that the cease and desist order prohibits the carrier from operating any flight rather than making diligent efforts to obtain the required documentation.

It is clear that the entire cease and desist order is not based upon any rational relationship to the facts involved in this proceeding or any consideration of public interest criteria or factors. It is simply a conclusion that because violations occurred, whether or not intentional, a cease and desist order should be issued as a matter of course without regard to the impact on the public, the Petitioner or the public interest objectives of the Board itself. This is surely arbitrary and capricious application of administrative power and requires that the order be set aside.

V.

The Board Erred in Failing To Review the Initial Decision of the Examiner.

Under Section 302.28(a)(2) of the Board's Economic Regulations (14 CFR 302.28(a)(2)), the petition for discretionary review of initial decisions may be filed only upon one or more of the following grounds:

- (i) A finding of a material fact is erroneous;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent;
- (iii) A substantial and important question of law, policy or discretion is involved; or
- (iv) A prejudicial procedural error has occurred.

This provision is derived from Reorganization Plan No. 3 of 1961, 75 Stat. 837, 49 U.S.C. 1324 Note, which authorized the Board inter alia to delegate certain of its functions to hearing examiners. However, the Reorganization Plan specifically required the Board to retain a discretionary right to review the action of any such hearing examiner in such manner as the Board shall by rule prescribe.

Therefore, the standards prescribed by the Board in Section 302.28(a)(2) supra are a necessary concomitant of its authority of delegation to hearing examiners.

Petitioner filed the timely petition for discretionary review of the Initial Decision in this proceeding (Tr. 666). Petitioner pointed out that the Initial Decision was based upon erroneous findings of fact, was based upon ultimate legal conclusions clearly contrary to law, and involved substantial, important and novel (insofar as they relate to Board policy) questions of law, policy and discretion transcending the instant circumstances and that review by the Board was required.

Petitioner specifically pointed out to the Board that the Initial Decision omitted reference to the most crucial and determinative facts adduced by the principal witnesses of the Bureau of Enforcement as to the intent of Mr. and Mrs. Friedman in their dealings. Petitioner pointed out that the conclusions of the Examiner were clearly contrary to law and that the instant proceeding was a matter of first impression before the Board involving far-reaching implications as to the administration of charter contracts with possible far-reaching impact upon all air carriers engaged in charter operations and imposition upon air carriers of liabilities not imposed by ordinary commercial law and not contained in any regulation, rule, or requirement of the Board.

While the Board admittedly has discretion as to the cases which it will review, it is bound by its own standards. It is clear that the allegations in Petitioner's petition for review clearly showed on the basis of the Initial Decision that review was required under the standards of Section 302.28(a)(2). It is also to be noted that the issuance of a cease and desist order is discretionary with the Board and is limited to circumstances where such action is "appropriate." In its petition for review, Petitioner pointed out the unusual circumstances involved, the necessity to take emergency action to avoid undue hardship upon the innocent victims of wrongdoing, the lack of any finding that Petitioner acted in other than good faith or wilfully violated any regulation of the Board, and that there was no justification for imposition of a sanction upon Petitioner which acted in accordance with advice of experienced counsel.

Thus, in its petition for review, Petitioner clearly demonstrated that the grant of the discretionary review was in full accord with the standards of Section 302.28 supra and that there were important matters of Board discretion

for which there are no governing precedents to guide the Examiner which required review by the Board.

While the Bureau of Enforcement filed an answer to Petitioner's petition for discretionary review, (Tr. 675), denying the merits of Petitioner's request, a fair inference can be drawn from the Bureau's answer in juxtaposition to the petition for review. That answer clearly indicated that there was reasonable dispute as to the crucial and determinative facts, and the applicable law, and that the issues involved questions of fundamental principles of case law not within the peculiar specialized jurisdiction of the Board, but of general applicability usually reserved for resolution by the constitutional courts.

Under these circumstances, the refusal of the Board to review the Initial Decision was legally arbitrary and capricious, an abuse of discretion, and a violation of its own standards.

CONCLUSION

For all of the reasons hereinbefore detailed, Order E-24998 of the Civil Aeronautics Board, should be reversed and set aside; or in the alternative, the proceeding should be remanded to the Civil Aeronautics Board for review by the Board itself and for further appropriate proceedings, including but not limited to, appropriate modification or cancellation of the cease and desist order.

Respectfully submitted,

/s/ Theodore I. Seamon

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APPENDIX A

Relevant excerpts from the Federal Aviation Act of 1958 (72 Stat. 731, as amended, 49 U.S.C. 1301 et seq.):

TITLE IV - AIR CARRIER ECONOMIC REGULATION

* * * * *

Tariffs of Air Carriers

* * * * *

Section 403. [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373]

* * * * *

Observance of Tariffs; Rebating Prohibited

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees,

and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

* * * * *

Relevant excerpts from the Civil Aeronautics Board Regulations:

PART 295 - TRANSATLANTIC SUPPLEMENTAL
AIR TRANSPORTATION

Subpart A - Provisions Relating to
Pro Rata Charters

* * * * *

Section 295.12 (14 C.F.R. 295.12) - Pretrip notification.

Upon a charter flight date being reserved by the carrier or its agent, the carrier shall provide the prospective charterer with a copy of this Part 295.³ The charter contract shall include a provision that the charterer, and any agent thereof, shall only act with regard to the charter in a manner

³ Footnote omitted.

consistent with this part and that the charterer shall within due time submit to the carrier the information specified in § 295.35. The carrier shall also require that the charterer and any travel agent involved shall furnish it in due time for review before flight the information required in §§ 295.36 and 295.22, respectively.

Section 295.14 (14 C.F.R. 295.14) - Terms of service.

* * * * *

(e) The carrier shall require full payment of the total charter price or the posting of a satisfactory bond for full payment prior to the commencement of the air transportation.

* * * * *

Section 295.22 (14 C.F.R. 295.22) - Statement of supporting information.

Travel agents shall execute, and furnish to air carriers, Section A of Part II of the Statement of Supporting Information attached hereto and made a part hereof, at such time prior to flight as required by the carrier to afford it due time for review thereof.

* * * * *

Section 295.35 (14 C.F.R. 295.35) - Passenger manifests.

(a) Prior to each one-way or round-trip flight a manifest shall be filed by the charterer with the air carrier showing the names and addresses of the persons to be transported and specifying the relationship of each such person to the charterer (by designating opposite his name one of the three relationship categories hereinafter described). The manifest may include "stand-by" participants (by name, address and relationship to charterer).

(b) The relationship of a prospective passenger shall be classified under one of the following categories and specified on the passenger manifest as follows:

(1) A bona fide member of the chartering organization at the time the organization first gave notice to its members of firm charter plans and will have been a bona fide member of the chartering organization for at least six months prior to the starting flight date. Specify on the passenger manifest as "(1) member."

(2) The spouse, dependent child or parent of a bona fide member who lives in such member's household. Specify on the passenger manifest as "(2) spouse" or "(2) dependent child" or "(2) parent." Also give name and address of member relative where such member is not a prospective passenger.

(3) Bona fide members of entities consisting only of persons from a study group, or a college campus, or employed by a single Government agency, industrial plant, or mercantile company, or persons whose proposed participation in the charter flight was permitted by the Board pursuant to request for waiver. Specify on the passenger manifest as "(3) special" or "(3) member" (where participants are from a study or campus group or from a Government agency, industrial plant or mercantile company).

(c) In the case of a round-trip flight, the above information must be shown for each leg of the flight and any variations between the eastbound and westbound trips must be explained on the manifest.

(d) Attached to such manifest must be a certification, signed by a duly authorized representative of the charterer, reading:

The attached list of persons includes every individual who may participate in the charter flight. Every person as identified on the attached list (1) was a bona fide member of the chartering organization at the time the chartering organization first gave notice to its members of firm charter plans, and will have been a member for at least 6 months prior to the starting flight date, or (2) is a bona fide member of an entity consisting of (a) students and

educational staff of a single school, or (b) employees of a single Government agency, industrial plant, or mercantile establishment, or (3) is a person whose participation has been specifically permitted by the Civil Aeronautics Board, or (4) is the spouse, dependent child, or parent of a person described hereinbefore and lives in such person's household, or (5) is a bona fide participant in a study group charter.

(Signature)-----

Section 295.36 (14 C.F.R. 295.36) - Statement of supporting information.

Charterers shall execute and furnish to air carriers Section B of Part II of the Statement of Supporting Information attached hereto and made a part hereof at such time prior to flight as required by the carrier to afford it due time for review thereof.

* * * * *

STATEMENT OF SUPPORTING INFORMATION*

* * * * *

Part II -- To be completed for pro rata or mixed charters only.

SECTION A -- To be supplied by travel agent, or, where none, by the air carrier or an affiliate under its control where either of the latter performs or provides any travel agency function or service (excluding air transportation sales but including land tour arrangements).

1. What specific services have been or will be provided by agent to charterer on a group basis? -----

2. What specific services have been or will be provided by agent to individual participants in the proposed charter? -----

* This must be retained by the air carrier for two years pursuant to the requirements of Part 249, but open to Board inspection, and to be filed with the Board on demand.

3. Has the agent or, to his knowledge, have any of his principals, officers, directors, associates or employees compensated any member of the chartering organization in relation either to the proposed charter flight or any land tour? Yes ☐ No ☐

4. Does the agent have any financial interest in any organization rendering services to the chartering organization? Yes ☐ No ☐

If answer is "yes," explain:

WARRANTY¹

I, --- (Name) ---, represent and warrant that I have acted with regard to this charter operation (except to the extent fully and specifically explained in Part II, Section A) and will act with regard to such operation in a manner consistent with Part 295 of the Board's Economic Regulations.

(Signature and address of travel agent or, if none, of authorized official of air carrier where such carrier or an affiliate under its control performs any travel agency function or service (excluding air transportation sales but including land tour arrangements).)

Section B -- To be supplied by charterer:

1. Description of chartering organization, including its objectives and purposes: -----

¹ Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both. Title 18, U.S.C., § 1001.

2. What activities are sponsored by the chartering organization?

3. When was the organization founded? -----

4. Qualification or requirements for membership in organization and membership fee, if any: -----

5. Has there been any reference to prospective charter flights in soliciting new members for the chartering organization? Yes ☐ No ☐

6. If total membership in the chartering organization is less than 1,000, submit list showing names and addresses of members in good standing.² If total membership in the chartering organization is 1,000 or more, state where a list of members is available for inspection. -----

7. Attach list of prospective passengers, showing for each: Name, address, and whether a member of chartering organization or relationship to a member of chartering group. (NOTE: This is a list of prospective passengers and does not necessarily have to represent the passengers actually carried.)

8. Purpose of trip: -----

9. What are requirements for participation in charter? -----

10. How were prospective participants for charter solicited (attach any solicitation material)? -----

11. Will there be any participants in the charter flight other than (1) members of the chartering organization or (2) spouse, dependent children,

²Not applicable to college campus or study-group charters, nor to charters limited to employees of a single Government agency, industrial plant or mercantile company.

and parents of a member of the chartering group residing in the same household with the member? Yes ☐ No ☐

12. Will there be any members of the chartering organization participating in the charter who will have been members of the organization for a period of less than six months prior to flight date?² Yes ☐ No ☐

If answer is "yes," give names of participants who will not have been members for six months and justify (see § 295.2(k)):

13. If there is any intermediary involved in the charter, other than the travel agent whose participation is described in Part II, Section A, submit name, address, remuneration and scope of activity:

14. Estimated receipts: ----- (Pro rata charge) -----

X -----
(No. of passengers) -----

= \$ -----
(Estimated receipts from charter)

Estimated receipts from other sources, if any: -----

Explain: -----

(a) Total receipts: \$ -----

Estimated expenditures, including aircraft charter (separately itemize air transportation, land tour, and administrative expenses):

<u>Item</u>	<u>Amount</u>	<u>Payable to</u>
-----	-----	-----

(b) Total expenditures: \$ -----

Explain any difference between (a) and (b): -----

15. Are any of the expenses included in Item 14, above, to be paid to any members of the chartering organization? Yes ☐ No ☐ If "yes," state

how much, to whom and for what services: _____

16. Is any member of the chartering organization to receive any compensation or benefit directly or indirectly from the air carrier, the travel agent, or any organization providing services in relation to the air or land portion of the trip? Yes ☐ No ☐ If "yes," explain fully: _____

17. Will any person in the group (except children under two years) be transported without charge? Yes ☐ No ☐

18. Will charter costs be divided equally among charter participants, except to the extent that a lesser charge is made for children under twelve years old? Yes ☐ No ☐

19. Separately state for the outbound and inbound flights the number of one-way passengers anticipated to be transported in each direction: _____

20. If more than one round trip is contracted for, will each group move as a unit in both directions? Yes ☐ No ☐

21. If transatlantic charters have been performed for organization during past 5 years, give dates and name of carrier performing charters: _____

22. Has a copy of Part 295, "Transatlantic Supplemental Air Transportation," of the Economic Regulations of the Civil Aeronautics Board been received by the charterer? Yes ☐ No ☐

WARRANTY OF CHARTERER¹

I, _____ and _____ represent and
(Name) (Name)

warrant that the charterer has acted with regard to this charter operation

(except to the extent fully and specifically explained in Part II, Section B), and will act with regard to such operation, in a manner consistent with Part 295 of the Board's Economic Regulations.

(Signature of person within organization
in charge of charter arrangements.)

(Signature and title of officer.

This should be the chief officer of the chartering organization except in the case of a school charter, in which case the warranty must be by a school official not directly involved in charter.)

1 WARRANTY OF AIR CARRIER

To the best of my knowledge and belief all the information presented in this statement, including but not limited to, those parts warranted by the charterer and the travel agent, is true and correct. I represent and warrant that the carrier has acted with regard to this charter operation (except to the extent fully and specifically explained in this statement or any attachment thereto) and will act with regard to such operation in a manner consistent with Part 295 of the Board's Economic Regulations.

(Signature and title of authorized
official of air carrier.)

* * * * *

PART 302 - RULES OF PRACTICE IN
ECONOMIC PROCEEDINGS

Subpart A - Rules of General
Applicability

* * * * *

Section 302.28 (14 C.F.R. 302.28) - Petitions for discretionary
review of initial decisions;
review proceedings.

(a) Petitions for discretionary review.

(1) Review by the Board pursuant to this section is not a matter of right but of the sound discretion of the Board. Any party may file and serve a petition for discretionary review by the Board of an initial decision within 25 days after service thereof. Such petitions shall be accompanied by proof of service on all parties.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules or precedent;

(iii) A substantial and important question of law, policy or discretion is involved; or

(iv) A prejudicial procedural error has occurred.

(3) Each issue shall be separately numbered and plainly and concisely stated. Petitioners shall not restate the same point in repetitive discussions of an issue. Each issue shall be supported by detailed citations of the record when objections are based on the record, and by statutes, regulations or principal authorities relied upon. Any matters of fact or law not argued before the examiner, but which the petitioner proposes to argue on brief to the Board, shall be stated.

(4) Petitions for discretionary review shall be self-contained and shall not incorporate by reference any part of another document. Except by permission of the Board or the Chief Examiner, petitions shall not exceed 20 pages including appendices and other papers physically attached to the petition. Petitions of more than 10 pages shall contain a subject index with page references.

(5) Requests for oral argument on petitions for discretionary review will not be entertained by the Board.

(b) Answer. Within 15 days after service of a petition for discretionary review, any party may file and serve an answer of not more than 15 pages in support of or in opposition to the petition. If any party desires to answer more than one petition for discretionary review in the same proceeding, he shall do so in a single document of not more than 20 pages.

(c) Orders declining review. Board orders declining to exercise the Board's right of review will specify the date upon which the examiner's decision shall become effective as the final decision of the Board. A petition for reconsideration of a Board order declining review will be entertained only when the order exercises, in part, the Board's right of review, and such petition shall be limited to the single question of whether any issue designated for review and any issue not so designated are so inseparably interrelated that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of the Board in the review proceeding.

(d) Review proceedings.

(1) The Board will exercise its right of review upon petition for review or on its own initiative when two or more Board members vote in favor of review. The Board will issue a final order upon such review without

further proceedings on any or all the issues where it finds that matters raised do not warrant further proceedings.

(2) Where the Board desires further proceedings, the Board will issue an order for review which will:

(1) Specify the issues to which review will be limited. Such issues shall constitute one or more of the issues raised in a petition for discretionary review and/or matters which the Board desires to review on its own initiative. Only those issues specified in the order shall be argued on brief to the Board, pursuant to § 302.31, and considered by the Board.

(ii) Specify the portions of the examiner's decision, if any, which are to be stayed as well as the effective date of the remaining portions thereof.

(iii) Designate the parties to the review proceeding.

Excerpts from Reorganization Plan No. 3 of 1961:

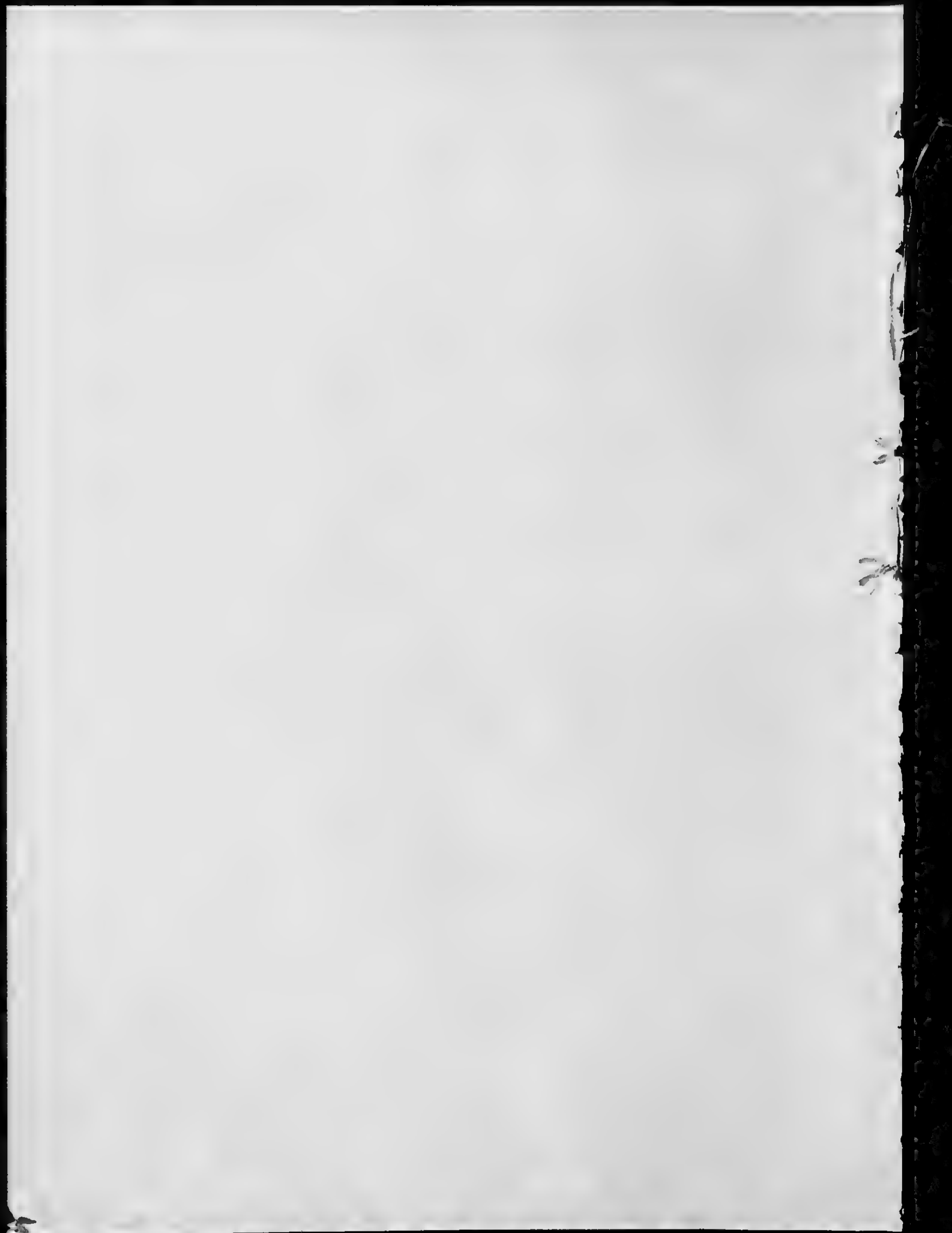
Effective July 31, 1961, 75 Stat. 837, 49 U.S.C. 1324:

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, May 3, 1961, pursuant to the provisions of the Reorganization Act of 1949, as amended.

CIVIL AERONAUTICS BOARD

SECTION 1. Authority to delegate.

(a) In addition to its existing authority, the Civil Aeronautics Board, hereinafter referred to as the "Board", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter:



Provided, however, That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Board shall retain a discretionary right to review the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time, and in such manner as the Board shall by rule prescribe: Provided, however, That the vote of a majority of the Board less one member thereof shall be sufficient to bring any such action before the Board for review.

(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Board, then the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Board.

SECTION 2. Transfer of functions to the Chairman.

In addition to the functions transferred by the provisions of Reorganization Plan No. 13 of 1950 (64 Stat. 1266), there are hereby transferred from the Board to the Chairman of the Board the functions of the Board with respect to the assignment of Board personnel, including Board members, to perform such functions as may have been delegated by the Board to Board personnel, including Board members, pursuant to section 1 of this reorganization plan.

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC., Petitioner,

CIVIL AERONAUTICS BOARD, Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 20 1967

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(1)

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of respondent the questions presented are:

1. Whether payments by the chartering organization to a travel agent in circumstances here involved were properly treated as payments to petitioner.
2. Whether the conclusion that petitioner had violated the Act and regulations is based upon legally sufficient findings and whether such findings are supported by substantial evidence.
3. Whether the imposition of the cease and desist order under the circumstances involved was within the power and jurisdiction of the Board.
4. Whether the cease and desist order is invalid by reason of the scope and breadth of its terms and whether this issue is open for review by the Court.
5. Whether the refusal by the Board to review the Initial Decision was legally arbitrary and capricious, an abuse of discretion, or in violation of the standards adopted by the Board in Section 302.28(a)(2) of its Procedural Regulations [14 C.F.R. 302.28 (a)(2)].

(iii)

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Capitol International Airways, Inc. (Capitol) has filed a petition to review Board Order E-24998 (Tr. 618-665), in which a Board hearing examiner (1) found that Capitol had charged more than its stated tariff for the operation of a charter flight and had failed to secure and retain proper documentation for such flight, and (2) directed Capitol to cease and desist from further such violations. Capitol also challenges Board Order E-24999 (Tr. 684), in which the Board declined to exercise its discretionary right to review the examiner's decision and order.

A brief summary of the requirements relating to the solicitation and performance of charter flights by supplemental air carriers such as Capitol, and of the principal facts here involved, will facilitate an

understanding of the case. Supplemental air carriers may not engage in individually ticketed transportation but rather may conduct only "charter trips" (Section 101(33) of the Federal Aviation Act, 49 U.S.C. 1301(33)). The charter flight here involved was from New York to Paris and Rome and constituted a "Trans-Atlantic" charter flight governed by Part 295 of the Board's Economic Regulations (14 C.F.R. 295). That regulation in effect permits a carrier to perform "pro-rata charters" on behalf of members of bona fide organizations such as fraternal groups, professional associations and the like, and also to participate in the formulation of charter parties comprised of members of a particular such group.^{1/} However, the carrier may appoint an agent to solicit the participants in such charters on its behalf only after a charter contract has been signed with the organization.^{2/} The carrier then may pay to its

^{1/} A "pro rata" charter is one in which the charter price is equally divided among the participants in the flight.

^{2/} 14 C.F.R. 295.11 provides:

"(a) A carrier shall not engage, directly or indirectly, in any solicitation of individuals (through personal contact, advertising, or otherwise) as distinguished from the solicitation of an organization for a charter trip, except after a charter contract has been signed.

"(b) A carrier shall not employ, directly or indirectly, any person for the purpose of organizing and assembling members of any organization, club, or other entity into a group to make the charter flight, except after a charter contract has been signed."

agent a commission not to exceed 5% of the total charter price for procuring the charter, and the regulations further provide that (14, C.F.R. 295.15) "a travel agent may not receive a commission from both the direct air carrier and the charterer for the same service".

In this case, the New York State Teachers Study Group ("Study Group") a "charter worthy" organization of New York teachers, apparently had included as a part of its overall activity program the offering of various charter flights to Europe on behalf of its membership. One of its officials was Mrs. Sari Friedman, whose husband, Mr. Michael Friedman, operated a travel service (Nelson Travel Service). Mr. Friedman was contacted by the Study Group and requested to contact various carriers to arrange transportation for the contemplated charter flights. Mr. Friedman contacted Capitol, who agreed to conduct a flight for the Group to Paris and Rome on July 1, 1965. Two contracts were entered into by Capitol with respect to this flight. One of these contracts^{3/} was with the Study Group as required by the Board's Regulation as a prerequisite to the carrier's participation in the solicitation of the members of the organization to participate in the flight. This contract, on a form supplied by the carrier, contained a statement across the bottom that payments for the flight should be made by check drawn to the account of the air carrier. The second contract was between Friedman, the travel agent, and the carrier. It provided, inter alia,

^{3/} See n. 2, supra. The contracts were dated the same day. We assume that the Study Group contract was first signed in light of the cited requirements.

for 5% of the charter price to be paid to Friedman as his commission. It further provided that Friedman would participate in the solicitation and development of the charter traffic involved, that he would arrange for the completion of the required C.A.B. documentation, and that he would not accept payments from the Study Group in his own name.

Thereafter, after the acceptance by Mr. Friedman of various sums from the Study Group not drawn to the account of Capitol, and the acceptance by Capitol of payments from Friedman drawn on his own account, Mr. Friedman absconded without remitting to Capitol other sums in his possession which had been received from the Study Group. Thus, at the time of the flight, the situation was one in which each participating member of the Study Group had paid his or her pro rata price but in which Capitol had not, in fact, received from Friedman the total tariff price. As a condition to performing the charter contract, Capitol insisted upon each member of the flight paying an additional pro rata amount to make up the difference between the contract price and the amount actually received from Friedman. Moreover, Friedman did not prepare the necessary documentation for the flight, nor did the carrier do so itself.^{4/}

In these circumstances, the Board's Bureau of Enforcement filed a complaint with the Board seeking the entry of a cease and desist order.

^{4/} The documentation requirements imposed by the Board's Regulations are for the purpose of insuring that charters are restricted to persons properly entitled to participate therein and thus to avoid individual transportation in the guise of charter service.

The complaint (Tr. 2-6) charged that Capitol, after having received the applicable charter price from the chartering party, the New York State Teachers Study Group (Study Group), collected an additional \$92.50 from each participant in the Study Group charter, immediately prior to the operation of the flight, thus violating Section 403(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1373(b)); the complaint charged also that Capitol failed to collect and retain the Statement of Supporting Information and the certified passenger manifest before operation of the flight, thus violating Sections 295.12, 249.10, and 295.35 of the Board's Economic Regulations (14 C.F.R. 295.12, 249.10, 295.35).

In its answer to the complaint, Capitol admitted collecting the \$92.50 from each participant in the flight, but asserted that it was justified in so doing because it had not received the full payment for the flight, a defect which it said was overcome by the collection of the prorated remaining balance among the flight participants (Tr. 12-13). Capitol denied that it failed to obtain and retain the passenger manifest; it alleged that as to the Statement of Supporting Information, its failure to obtain that document was justified by its diligent attempts to do so (Tr. 13).

Thereafter, hearings lasting two days were held (Tr. 33-404), and testimony was received from the Study Group's President, representatives of Capitol, the travel agent involved, and other participants in the Study Group flight. After the close of testimony, briefs were submitted to the examiner (Tr. 622) and his decision then issued (Tr. 618).

The examiner concluded that Capitol had received payment of the full charter price prior to its collection of an additional \$92.50 from each passenger, and that Capitol, by virtue of that collection, had violated the Act as charged; Capitol was also found to have failed to obtain the Statement of Supporting Information and the certified passenger manifest as charged by the Bureau of Enforcement (Tr. 656). The examiner entered an order directing Capitol to cease and desist from the aforesaid violations (Tr. 663).

Regarding the overcharge issue, the examiner found that the course of dealing between Capitol, Friedman and the Study Group was such that Capitol was chargeable with receipt of the funds which the Study Group paid to Friedman for the flight (Tr. 643, 649-50). As found by him, the "course of dealing" between these parties was as follows: The contract between Capitol and the Study Group (on a form provided by Capitol) provided for the use of a DC-8 aircraft seating not more than 183 persons at the tariff price of \$52,331 for a flight New York-Paris-Rome-New York, leaving July 1, 1965, returning September 3, 1965. The charter price was payable in the following installments (Tr. 408):

- 10% (\$5,233.10) on signing the contract;
- 10% (\$5,233.10) within 60 days thereafter;
- 40% (\$20,932.40) on March 1, 1965; and
- 40% (\$20,932.40) on May 1, 1965.

The contract contained the legend "Make all checks payable to Capitol Airways, Inc.," and included escape clauses designed to protect Capitol should the charterer cancel, go bankrupt, commit a breach of the contract,

or fail to meet the payment schedule.^{5/} In the latter event, Capitol could elect to cancel the charter (Tr. 409).

The contract between Capitol and Friedman, i.e., the "Charter Agency Agreement" (Tr. 410), appointed Friedman as Capitol's agent "to solicit and develop the charter traffic" for the July 1 flight and, inter alia, to represent the carrier with the Study Group in the completion and transmission of all documents required by the Civil Aeronautics Board. Included as paragraph 6 was a provision whereby —

"Agent agrees to assure that Charterer makes all funds covered by this agreement payable to the Carrier and Agent agrees to assure that such funds are transmitted to the Carrier in accordance with the terms of the respective charter contracts, and Agent further agrees not to accept such funds in Agent's name." (Tr. 410).

Friedman was to receive from Capitol the standard agency commission of 5% of the fare paid by the Study Group.

The examiner found that during the six months preceding the flight, the Study Group received funds covering the charter price from its flight participants and transmitted the funds to Friedman for ultimate payment (Tr. 627, 630). Friedman commingled the various monies he was receiving with his own funds, and submitted payments to Capitol out of his own account (Tr. 650-651). From December until June, Capitol accepted such payments from Friedman and applied them to the charter price, although the payments were behind schedule more often than not (and were sometimes stopped and resubmitted by Friedman) and

^{5/} The legend "make all checks payable to Capitol Airways" (Tr. 408) is not in terms specified as a condition of the contract.

were drawn not by the Study Group, as required by the Charter Contract and the Agency Agreement, but by Friedman (Tr. 649). As the time for the flight drew nearer, Capitol extended the final payment date for Friedman's benefit; but by flight time, not having received from Friedman all of the monies which he had received from the Study Group for the July 1 flight, Capitol directly collected the remaining charge, prorated \$92.50 per passenger, and operated the flight (Tr. 636-637). Until the last minute pre-flight collection, Capitol had dealt only with Friedman and had not contacted the Study Group after entering into the Charter Contract with it, and the Study Group was therefore unaware that Capitol had not been paid by Friedman until just prior to the flight (Tr. 631, 637, 651-652).

Based on this course of dealing, the examiner found "Friedman's receipt of payments from the study group to be applied to the July 1 charter a constructive receipt by Capitol" (Tr. 643). He concluded that Capitol, not the Study Group, should bear the ultimate responsibility for Friedman's defalcation, ^{6/} and that since it was considered to have received the funds paid to Friedman, Capitol was properly

^{6/} The examiner concluded that Friedman's ultimate conviction of grand larceny for appropriating the Study Group's payments, and the issuance by the New York State Attorney General of a cease and desist order against Friedman, the Study Group, and Sari Friedman, the Study Group's President, and Friedman's wife, did not inure to Capitol's benefit as a determination of responsibility for the payment of the Study Group's funds, as Capitol had argued, since neither the guilty plea of Friedman nor the dismissal of Capitol from the Attorney General's proceedings involved issues relating to violations of the Federal Aviation Act and the Board's regulations (Tr. 641).

charged with violating section 403(b), based on its acquiescence in the Study Group's payments to Friedman rather than to Capitol, its acceptance of Friedman's own checks payable to Capitol's order, its failure to require punctual payment of the installments of the charter price, and its collection of the additional money from the tour passengers (Tr. 652).

The examiner found Capitol responsible not only under general principles of agency law, which he discussed at length (Tr. 643-649), but also under the more stringent responsibility imposed upon air carriers for the activities of their agents. (See Section 403(b), 49 U.S.C. 1373(b), infra, p. 52). The examiner reaffirmed earlier Board and judicial precedents holding regulated carriers to more strict accountability, stating:

"Actually, the responsibility of air carriers for the actions of their agents rests upon a broader foundation than an application of the principles of agency applied between private litigants. In those situations involving regulatory statutes, the principal is generally charged with the responsibility for the acts of its agents and employees, even in situations in which there would perhaps be no liability for damages in a private law suit. This principle is one of public policy, for in its absence the purpose of the regulatory statute would be defeated." (Tr. 650, citing Standard Air Lines, Inc., Noncertificated Operations, 10 C.A.B. 486, 494-95 (1949)).

On the documentation issues, the examiner rejected Capitol's argument that its prior experience with and documentation of previous Study Group flights were sufficient to satisfy the Board's requirement that the airline receive proof that the chartering group is a

bona fide "charter-worthy" organization:

"Part 295 prescribes current documentation for each charter and does not entrust accomplishment of the regulatory purpose to a favorable presumption based on prior documentation. Operation of the flight without completing the required documentation is a substantial violation of the regulations. The violation is not excused even when account is taken of the adverse consequences of a last-minute cancellation of the flight." (Tr. 653).

As to the uncertified passenger manifest prepared at the last minute by Capitol itself, rather than the charterer, the examiner found it to be an insufficient substitute for one prepared by the chartering party, as required by the Board's regulations. The air carrier, concluded the examiner, lacks the knowledge of the individual charter passengers which the chartering group has, and which is needed properly to prepare the form and classify the passengers under the appropriate categories of their relationship to the chartering group. (Tr. 654).

Based upon his findings of overcharge and violation of the documentation regulations, the examiner concluded that the remedial sanction of a cease and desist order was appropriate. The examiner was unwilling to assume that the violations would not be repeated, and he did not agree that the outstanding court injunction against the Study Group and Sari Friedman and the conviction and sentence of Michael Friedman would effectively control Capitol in its "extensive civil charter operations." (Tr. 655).

Capitol filed a timely petition for discretionary review of the examiner's decision with the Board (Tr. 666). By Order E-24999, April 18, 1967, the Board declined review, thereby effectuating the examiner's decision as the final order of the Board (Tr. 684). Capitol then filed its petition in this Court on June 15, 1967, seeking review of the examiner's decision (Order E-24998) and the Board's order declining review (Order E-24999).

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act, Reorganization Plan No. 3 of 1961, and the Board's regulations principally involved are set forth in the Appendix (infra, pp.51-9).

SUMMARY OF ARGUMENT

I

The Board correctly determined that Friedman was the agent of Capitol for the collection of the charter price and, thus, that Capitol constructively received the funds which the Study Group collected with reference to the Capitol flight and paid to Friedman. Thus when Capitol collected an additional \$92.50 from each enplaning passenger it violated Section 403(b) of the Act by collecting greater compensation than was specified by its tariffs. Although Capitol asserts that Friedman was the agent of the Study Group in receiving funds from it for payment of the charter price, the fact is that he was the agent of Capitol. There was a written contract between the two,

designating Friedman as the agent of Capitol and the contract made specific reference to collection of the funds. The fact that Friedman breached the agreement cannot be relied on to free Capitol from responsibility for Friedman's collections in view of the plain fact that Capitol acquiesced in his conduct. Under general principles of agency law, Capitol authorized Friedman to receive funds in his own name for application to the Capitol charter flight. Thus, Capitol modified the terms of its agreement with Friedman so as to directly authorize him to receive payment; further, Capitol ratified his activities thereby giving retroactive consent; finally, Capitol's failure at the time of the events involved to deny that Friedman was authorized to collect the funds requires that it now be estopped to deny his authority. Hence, the Board's determination that the funds collected by Friedman from the Study Group with reference to the flight in question were constructively received by the airline and thus that Capitol collected, actually and constructively, excess compensation is supported by the evidence and in accord with applicable legal principles.

II

The Board also determined with respect to the same flight that Capitol violated the Board's regulations requiring certain specified documentation for each trans-atlantic charter operation and this conclusion is supported by substantial evidence. In fact, although Capitol suggests that its violation was of a technical nature and should be excused and further suggests that it should be free to violate the

Board's requirements in the future whenever it is expedient to do so, Capitol does not contest the Board's findings on this issue. Petitioner does take exception to some of the findings supporting the tariff violation but it is clear from an examination of the record that the examiner's findings are fully supported by the weight of the evidence and Capitol's allegations of error are without substance.

III

The Board entered a cease and desist order appropriately designed to prevent any recurrence of the violations which it found and in the circumstances of the case and in light of Capitol's present attitude, it is clear that the order was a proper exercise of the Board's discretion.

IV

As authorized by statute and regulation, all of the foregoing Board action was taken by affirming the decision of the hearing examiner and adopting the order which he recommended. The Board considered the decision below and Capitol's allegations of error as set forth in its petition for discretionary review but, since it agreed with the position of its examiner, the Board declined to proceed with further briefs or argument and gave effect to the examiner's decision as its own. The Board was thus acting within its proper discretion and its decision should be affirmed.

ARGUMENT

Introduction

The underlying issue presented by this case is whether an air carrier may avoid responsibility for the defaults of its duly constituted agent in financial transactions with its patrons, through reliance upon notices and provisions inserted in its various contractual arrangements with the agent and the patrons designed to protect the carrier against such defaults by specifying that the patrons shall make, and the agent shall accept, payments drawn only to the account of the carrier. The Board's hearing examiner predicated his determination of carrier responsibility in the circumstances of this case primarily upon general principles of agency as they relate to transactions between private parties, and only secondarily upon the public service responsibilities of air carriers. Consequently, our argument is likewise directed primarily to these general agency principles, but we also show that the carrier should not be permitted to evade its responsibilities in this manner.

I. The Board correctly determined that petitioner is chargeable with receipt of the funds collected by Friedman for the July 1 charter flight.

A. Friedman was Capitol's agent in collecting the charter funds.

1. Capitol directly authorized Friedman as its agent.

Capitol and the Study Group entered into a charter contract procured through Friedman at the Study Group's request which bore a legend that the Study Group was to "make all checks payable to Capitol Airways, Inc." (Tr. 408). In addition, Capitol entered into an agreement with

Friedman designating him as its agent, inter alia, to solicit and develop the charter traffic and assist in the completion of the required CAB documentation for the Study Group flight. The agency agreement between Capitol and Friedman (see the text set forth at p. 7, supra) further provided that Friedman should not accept payment in his own name but rather that the checks were to be made payable to and transmitted to Capitol. Capitol now contends that Friedman's departure from these limitations on his authority to collect the charter price is attributable to Friedman as the agent for the Study Group in making the payments to Capitol rather than as agent for Capitol in receiving such payments, and, therefore, that Capitol did not receive the monies paid to Friedman but not actually turned over to Capitol. ^{7/}

The Board has reached the opposite conclusion, however, determining that Friedman collected funds for the July 1 charter from the Study Group as the agent of the airline. We subsequently show that this conclusion rests upon substantial evidence buttressed by various legal concepts. We first show that, as the evidence indicates, Capitol and Friedman modified the terms of their agreement by a mutually agreed

^{7/} While asserting that Friedman was the agent of the Study Group, petitioner has ignored the undisputed fact that Friedman was also its formally appointed agent, with regard to the solicitation and performance of the flight here involved, (Pet. Br. 16-21). Capitol's creation of this significant relationship with Friedman was the single vital fact that made possible Capitol's subsequent extension of authority to Friedman and its ratification of his actions. It cannot be ignored.

upon and consistent course of conduct in violation of the contract provision purporting to limit Friedman's authority. It was decided by both parties, as evidenced by their respective actions subsequent to the adoption of the agreement, that the limitations of paragraph 6 forbidding Friedman to accept payment by checks other than those drawn to Capitol were to be omitted from the contract. Their actions clearly reflect their respective intentions to depart from and thus ^{8/} modify the written terms of the agreement.

^{8/} It is obvious that a contract can be modified through an agreement between the parties, Carnival Co. v. Metro-Goldwyn-Mayer, Inc., 23 App. Div. 2d 75, 258 N.Y.S. 2d 110 (1965); S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 111 N.W. 2d 681 (1961); that an agreement to change a contract need not be expressed in the same manner as the original contract, e.g., a written contract may be varied by a subsequent oral contract, 6 Williston, Contracts § 1828 (2d ed. 1936), Restatement of Contracts §§ 407, 408 (1932); and that the parties may impliedly amend a contract by their actions and course of dealing between themselves. Thus, in Matanuska Valley Farmers Cooperating Association v. Monaghan, 188 F.2d 906 (C.A. 9, 1951) the subject written contract involved a complicated formula for determining the amount which plaintiff was to receive for his produce. From the beginning, however, both parties had ignored the terms of the contract; plaintiff was paid under a different and simpler formula which proved initially to be to his advantage. Plaintiff accepted these payments for several years until changed circumstances had the effect of reducing payments under the substituted formula to a level below that which would have been due had the original payment scheme applied. The court found that since the parties had in effect followed the new method of payment from the outset and had made no attempt to conform to the provisions of the written contract:

"they must be deemed to have modified the written contract by mutual agreement. It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties, as well as by evidence of an explicit agreement to modify" (188 F.2d at 909).

See, also, Saul v. McIntyre, 190 Md. 31, 57 A. 2d 272 (1948); Margolys v. Mollenick, 98 N.Y.S. 849 (App. T. 1906); Corn Exchange Nat. Bank & Trust
(footnote continued)

As matters developed, neither Friedman nor Capitol intended to be bound by the limitations in paragraph 6. At the outset Friedman tendered and Capitol accepted his agency check to cover the deposit. Thereafter, Friedman continued to offer his own checks in payment and Capitol continued to accept them.^{9/} Moreover, the examiner found evidence to indicate that it was the common practice of Capitol and the industry to accept charter payments in the form of agency checks, that Capitol had accepted Friedman's agency check in the past with respect to other charters, and that Friedman had discussed the matter of agency payment with representatives of Capitol and had learned that direct payment by the charterer was required only where the airline did not know the agent (Tr. 661). Thus, by their conduct and understanding, Capitol and Friedman modified the agreement between themselves eliminating the limitations therein on Friedman's authority to collect the charter price.

Co. v. Taubel, 113 N.J.L. 605, 175 A. 55, 59 (Ct. Err. & App. 1934); Restatement of Contracts § 235, comment h (1932); 3 Williston, Contracts § 623 (2d ed. 1936).

^{9/} The record must be set straight with respect to the number of Friedman's own checks which Capitol accepted. Petitioner asserts that Capitol accepted only two such checks (Pet. Br. 12, 16) but the record clearly discloses that Capitol accepted four of Friedman's agency checks for the July 1 Study Group charter: (probably) December 29, 1965 (Tr. 412); January 11, 1965 (Tr. 505-506, 414); February 8, 1965 (Tr. 507-508); May 12, 1965 (Tr. 418, 420). [Two of these checks were subsequently returned by Capitol to Friedman, one at Friedman's request and the other because it was dishonored. The returns do not alter the inferences that would otherwise be drawn from prior acceptances.] Moreover, not only did Capitol accept these four checks but Capitol also solicited Friedman in writing on several occasions asking specifically for "his" checks (see, especially, Tr. 415, 419). Beyond any doubt the record discloses evidence sufficient to support the examiner's finding that the "carrier repeatedly, and without protest, accepted and deposited Friedman's agency checks" (Tr. 643).

Not only did Capitol's course of conduct in accepting payment through Friedman indicate this change in the scope of Friedman's agency, but there is affirmative evidence that Capitol recognized Friedman's new role. First, Capitol wrote to Friedman on April 2, 1965 concerning a deposit which he had made with Capitol for a charter flight to be operated in behalf of the "New Knickerbocker League of Childrens Asthma Research Institutes and Hospitals", an organization unrelated to the Study Group (Tr. 520-21). The Knickerbocker charter had been cancelled and Capitol suggested that Friedman allow the airline to credit the funds on deposit for that flight to the other charters which Friedman had arranged with Capitol (including the Study Group charter with respect to which the March 1 payment in excess of \$20,000 was then a month overdue)^{10/}. Second, Capitol instructed its New York sales manager to extend the time for payment by Friedman "because we felt that he was a man of means but that he was, his cash was just a little tied up" (Tr. 208).

If the airline had truly been of the opinion that Friedman dealt with it only as the agent of the various charter parties whom he represented, neither of these transactions could have occurred. Thus, if Capitol had not looked upon Friedman as its agent it could not have suggested that the funds initially applied to the Knickerbocker charter be applied to other Friedman-arranged charters because if Capitol had received these funds from the Knickerbocker League or from the League's agent such a transaction would have been an illegal misappropriation.

^{10/} "Since you have a deposit in the amount of \$1,044.75 on this charter we would like to know if you desire a refund or the transferral of the deposit to other charters you are holding." (Tr. 520).

Likewise, if Friedman were only the agent of the Study Group it would be immaterial from Capitol's point of view that he had the means to pay the Study Group's debt since as agent of the Study Group he had no personal responsibility for payment of its debts. Since in fact, however, Capitol viewed Friedman as its agent it was able to look upon all the funds owing to it with respect to Friedman-arranged charter flights as owing to it from a single source--Friedman--irrespective of the identity of the charter party. Additionally, since Capitol saw Friedman as its own agent and since as its agent Friedman owed a fiduciary duty to Capitol, the airline was able to rely on this duty when it looked to Friedman's personal wealth for payment of the charter price and decided to extend to him the time in which to make payments.

The clause in Capitol's agency agreement with Friedman which purported to limit Friedman's authority was part of a form contract. It existed for Capitol's protection. In this case, however, Capitol chose to relinquish the protection which it afforded, preferring instead the convenience of dealing directly through its agent. Capitol cannot have it both ways. As the court said in Matanuska Valley (supra, n.8):

"The appellee should not be permitted to modify the contract when it is to his benefit to do so and then reinstate it and insist upon strict performance when that position would benefit him most. We think that is what he is attempting to do here" (188 F.2d at 910).

The parties have acted inconsistently with any theory other than that Friedman was in fact authorized by Capitol to receive payment from the Study Group in his own name and that Friedman was Capitol's agent for collection of the charter price. The conclusion is compelled that

the limited collection agency was broadened by the conduct of the parties to embrace an authorization to Friedman by Capitol to collect from the Study Group in his own name and to transmit such receipts to Capitol by his own checks.

2. Capitol's acquiescence in Friedman's course of conduct constituted a ratification.

It is clear from the foregoing discussion that Capitol authorized Friedman to collect the charter price in its behalf. That fact should be dispositive of the question of Friedman's authority. Additionally, however, principles of ratification are applicable. Capitol has sought refuge from responsibility in the fact that the initial agency agreement between itself and Friedman narrowly defined the scope of the latter's authority and that it impliedly informed the Study Group of this limitation by the charter contract legend that all checks should be made payable to Capitol.

In the first place, there is no basis for any assumption that the Study Group was required to inquire into the terms of the arrangement between Capitol and its admitted agent Friedman. In any event, it is clear that a principal may ratify acts which, but for the ratification, would be beyond the scope of the agent's authority, and that such a ratification occurred here. Ratification need not be express but may be inferred from the principal's failure to repudiate the "unauthorized" acts of his agent.

"Although an agent is not authorized to act as he does, if the principal, with knowledge of the facts acquiesces in it, permitting the agent to do similar acts, there is normally ratification as to past acts . . . and authority

to do similar acts in the future . . ." Seavey, Agency
§21H (1964). 11/

This principle is so well established that it hardly needs support from the cases. An appropriate illustration is Goldstein v. Tank, 73 Misc. 300, 132 N.Y.S. 466 (1911), which involved the sale of a chemical fire extinguisher. Although the sale was made through a "sales agent" the manufacturer insisted that the agent had no authority to receive payment. Nonetheless, when the buyer gave notice to the manufacturer that he had made payment to the agent, the manufacturer did not protest but instead sought for three months to collect from its agent. The court pointed out that "It is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge." 132 N.Y.S. at 468. ^{12/} In these circumstances, where the seller was willing to accept, however grudgingly, payment through his sales agent, the court held that the seller ratified (and thus retroactively authorized) his agent's acceptance of payment

11/ Accord, Restatement (Second) of Agency §§43(1), 94, 82 (1957).

12/ Petitioner has suggested that it lacked sufficient knowledge of Friedman's conduct to have ratified it. For example, Capitol claims that it could not have known that Friedman, in accepting funds designated for the July 1 flight, was commingling them with his own funds (Pet. Br. 33). Since Capitol received partial payment of the charter price from Friedman and since Friedman remitted by agency checks, however, Capitol is chargeable with knowledge that Friedman was receiving funds from the Study Group and commingling them with his own funds. Booth Fisheries Corporation v. Coe, 72 U.S. App. D.C. 195, 114 F.2d 462, cert. denied, 311 U.S. 691 (1940); National Labor Relations Board v. Local 3, Bloomingdale, District 65, Retail, Wholesale & Department Store Union, CIO, 216 F.2d 285 (C.A. 2, 1954).

^{13/}
in the seller's behalf.

Those actions of Capitol which illustrate its ratification of Friedman's "agency" in collecting the charter price on Capitol's behalf have been outlined above. Capitol accepted four of Friedman's agency checks in part payment of the charter price and solicited his payment of the remainder of the price on numerous occasions by letter and telephone. Moreover, Capitol dealt only with Friedman, never contacting the Study Group even as the payments fell increasingly behind, and looked only to Friedman for payment. It is clear that Capitol cannot be allowed to acquiesce for an extended period of time in a method of payment when that suits its fancy and then, when difficulty develops, to deny that very authority in its agent through which it has received substantial payments.^{14/}

^{13/} The courts have spoken in terms of ratification, acquiescence and affirmance. Whatever the language, it is clear that when a principal allows his agent to perform an act not previously authorized, the principal will be bound by his agent's conduct just as if he had previously granted express authority to the agent. Brown v. Cowden Livestock Co., 187 F.2d 1015 (C.A. 9, 1951); Bronson's Executor v. Chappell, 79 U.S. 681 (1870); Millet v. Miller, 135 Neb. 123, 280 N.W. 442 (1938); Columbia v. Lee, 243 App. Div. 361, 277 N.Y.S. 161 (1935); Guild v. Hopkins, 271 App. Div. 234, 63 N.Y.S. 2d 522 (1946).

^{14/} Petitioner has suggested at this point in the argument that Friedman, in collecting the charter funds, did not purport to act for Capitol and, therefore, that Capitol could not have ratified his actions. But as previously noted, Friedman was Capitol's agent and hence there did exist at the time of the payments in question a relationship on which ratification could operate. Just as in the Goldstein case, it is unnecessary here that there be specific proof that the agent purported to act for the principal in the subject transaction. It is enough that the agent was agent with respect to some aspects of that transaction and that the principal failed to repudiate his assumption of additional authority.

(footnote continued)

Furthermore, Capitol cannot so lightly avoid its public service obligations or the responsibilities placed upon it by the Federal Aviation Act with respect to the collection of transportation charges. In the first place, members of the public dealing with a duly authorized carrier agent should be entitled to assume that the agent is empowered to take the normal steps incident to the providing of the transportation service including the receipt of payment therefor. Indeed, the Act is particularly stringent in its requirements with respect to a carrier's responsibilities in the area of payment. Thus, Section 403(b), infra, p. 52 provides that "No air carrier . . . shall charge or demand or collect or receive a greater or less or different compensation for air transportation" than that specified in its tariffs, either directly or "through any agent or broker." A carrier can act only through its agents, and the Board has long considered that a carrier may not avoid its responsibilities through imputing the actions involved to its agents. On the contrary, the obligations of a carrier and the requirements of the

Moreover, the fact is that Friedman did act for Capitol in receiving payments from the Study Group. As discussed above, Capitol and Friedman modified the terms of their original agreement so that Friedman was authorized to collect the charter price. It is reasonable to believe that if the Study Group was aware of the nature of the initial principal-agent relationship it was also aware of the subsequent modification of that relationship and thus knew that Friedman was acting in Capitol's behalf. It is difficult to understand how the Study Group could have thought otherwise in view of the fact that it never received any objection to its conduct in making payments to Friedman. The Study Group thus correctly assumed that Capitol acquiesced in Friedman's new role.

statute are such as to dictate that the activities of the agent be closely supervised or that, where such supervision is not provided, the carrier take affirmative steps to ascertain that the proper payments have been met before any transportation is provided. Capitol breached that responsibility. Here Friedman was the agent of Capitol and, in the circumstances involved, Capitol cannot shield itself from the consequences because the violation occurred through the medium of an agent. As the Board has previously ruled with respect to similar facts:

"an air carrier properly may be held accountable for the acts of its employees and ticket agents . . . on the principle that retention of the benefits derived from the unauthorized activities of an agent with knowledge of those activities constitutes a ratification thereof." Standard Air Lines, Inc., Noncertificated Operations, 10 C.A.B. 486, 494 (1949).

3. Capitol's conduct estops it from denying Friedman's agency.

As shown, Friedman was Capitol's agent in collecting the charter price not only because Capitol directly authorized him to do so but also because Capitol ratified his conduct. Capitol is accountable here on yet another principle of agency law. Thus, there are strong equitable considerations which militate against allowing Capitol to deny responsibility for the acts of its agent. As between Capitol and the Study Group, the former was better situated to protect both sides from the unfortunate consequences of Friedman's dishonesty. No unusual effort was called for. Capitol had only to enforce the terms of its contract: to insist on direct payment and to require payment on time. Assuming but not conceding that it could have avoided responsibility through communicating with the Study Group and giving it some warning of the dangerous situation which was developing, Capitol did not do so. ^{15/} Rather it preferred instead to deal with its agent and to look only to him, "a man of means," for its money. ^{16/} As the hearing examiner quite properly found, the Study Group relied on Capitol's "manifestation of authority in

^{15/} The court should not be misled by Capitol's specious argument that contacting Mrs. Friedman would have been to no avail (Pet. Br. 18-19). Not only is there no support for this assumption, but it is contrary to the fact that no evidence has been presented casting any shadow on Mrs. Friedman's character. In fact, petitioner entirely misses the point when it asserts that Mrs. Friedman's trust in her husband would have prevented her from taking action had she been apprised of the situation (Pet. Br. 16-17). She trusted him not only because he was her husband but also because Capitol failed to give her any reason for behaving otherwise.

^{16/} See p.18 , supra, for a discussion of this point.

Friedman" (Tr. 651-652). The Study Group collected its funds and made regular payments to Friedman. It relied on the total absence of any word from Capitol as assurance that all was well. ^{17/} Capitol knew that Friedman was collecting the funds in his own name and knew or ought to have known that the Study Group in making its payments to Friedman was relying on Capitol's silence as assurance that Capitol was receiving the funds as required. ^{18/} Capitol thus is in no position to come forward after the Study Group has surrendered possession of thousands of dollars to Capitol's agent and deny that very agency.

^{17/} Capitol asserts that there is no direct evidence proving that the Study Group believed Friedman to be the agent of Capitol for collection purposes. (Pet. Br. 25). However, as previously noted Friedman was Capitol's agent for all other purposes relating to the flight and it is very reasonable to infer that he was the agent for this purpose as well. Further, Capitol is the person which established the payment method. When the Study Group made payments to Friedman, Capitol not only did not protest but accepted payments from Friedman in the form of his own checks. Thus, Capitol's own action swept away the prima facie support for its contention that the Study Group was bound by the written terms of the two agreements and, as the examiner found, the Study Group could and did rely on an apparent authority in Friedman to receive payment in behalf of Capitol.

"The study group, having received no objection from Capitol that the initial deposit, which Capitol received in the form of Friedman's agency check dated January 11, 1965, must be paid by the charterer's check to the carrier and not to the agent, received by clear implication Capitol's manifestation of authority in Friedman to collect as Capitol's agent and in Capitol's behalf. Subsequent payments from the study group to Friedman were made pursuant to that manifestation and under the assurance that Capitol acquiesced in Friedman's receipt of payments in its behalf" (Tr. 651-52). See Hoiden v. Kohout, 12 Ill. App. 2d 161, 138 N.E. 2d 852, 854 (1956).

^{18/} See note 12, supra.

On similar facts, the courts have been quick to apply theories of estoppel. For example, Scott v. Continental Assurance Co., 167 Ohio St. 515, 150 N.E. 2d 38 (1958) is squarely in point. There defendant insurance company allowed plaintiff to pay his insurance premiums for an extended period of time to an unauthorized sales agent in spite of clear language in the policy forbidding such payments. The court held that the company could not be heard to insist that its agent was merely a soliciting agent.^{19/} The same reasoning applies to the present case. Capitol is estopped to deny that Friedman was authorized to collect the charter price in its behalf. As the Restatement suggests, Capitol's duty could have been "discharged by an inexpensive letter or telephone message."^{20/} Capitol must bear the responsibility for lulling the Study Group into a false sense of security.

- B. Assuming a dual agency situation as contended by Capitol, Capitol nevertheless is responsible for Friedman's defalcation because in a dual agency situation in which neither principal profits from the transaction the responsibility must be borne by the party whose conduct contributed more directly to the loss.

As discussed above, Friedman was the agent of Capitol for the July 1 charter flight. Friedman was Capitol's agent not only with

^{19/} Petitioner's attempt to distinguish Scott wholly misses the point. That the agent in Scott was not also the agent of the insured is irrelevant since we cite that case, not to demonstrate that as between Capitol and the Study Group the former should bear responsibility for Friedman's defalcation, but for the limited proposition that Capitol, having ignored the language of the charter contract with respect to method of payment for the entire life of the agreement and having accepted payment through its agent (which Friedman undeniably was), cannot now assert that he was not authorized to receive payment. Accord, Mortgage & Acceptance Corporation v. Stewart, 142 S.C. 375, 140 S.E. 804 (1927); Marquette v. Williams, 54 S.D. 54, 222 N.W. 496 (1928); Hoiden v. Kohout, 138 N.E. 2d 852 (Ill. App. 1956); Restatement (Second) of Agency § 8B (1957).

^{20/} Restatement (Second) of Agency § 8B comment d (1957).

respect to the limited duties encompassed by the written terms of the charter agency agreement (i.e. to solicit and develop the charter traffic, to assist in the completion of the required CAB forms, etc.) but also with respect to the collection of the charter price from the Study Group. However, Capitol asserts that Friedman was the agent of the Study Group as well. Thus it points to the fact that he was employed by the Study Group to engage the airline in the first instance, and asserts that the Study Group also purported to make Friedman its agent in making payments towards the charter price. Apart from the fact that this conclusion rests merely on Capitol's say-so, the carrier is not aided by the contentions.

Thus, even if we assume at this point that with respect to the same funds Friedman ostensibly was acting as the agent of both parties, such a situation in and of itself would be neither unusual nor irregular in many circumstances.

"A person may be an agent of one person for one portion of a transaction, later becoming the agent of the other party for a subsequent portion A person who may be an agent for a depositor in putting money into a bank . . . [may be] the agent of the bank, the receiving teller, in accepting it for the bank." Seavey, Agency § 12B (1964).

However, the purported creation of such a "dual agency" leads to the very sort of problems involved in the present case, and Capitol cannot avoid responsibility by relying on the very difficulties which arose from the situation which it created.

The result is the same under either the responsibilities placed upon Capitol by the Federal Aviation Act (see p. 23 , supra) ^{21/} or under the law of agency as it would be applied in a private litigation. The precise question here presented, i.e., who should bear the loss as between two principals of a single agent owing conflicting loyalties to each, does not often arise in the present context where each of the principals, although perhaps negligent in supervising its agent, is innocent of any attempt to defraud the other. Rather, the typical "dual" agency case involves not dual agency but a situation in which the agent of a single principal is compromised in behalf of a third party in whose interest he attempts to work a fraud on his nominal principal. ^{22/}

Although few cases have been decided on the precise question here involved and it has been suggested that the existing cases are of little precedential value, ^{23/} a single, simple rule of law has emerged and it provides a key to the present situation. As stated by Seavey "If one of the parties is more responsible for the situation than the

^{21/} Petitioner asserts that the Board is not the forum for an adjudication between the passengers and the carrier insofar as attempting to order a refund (Tr. 554) but the fact is that the Board has the responsibility for enforcement of the Act and that an overcharge is at issue does not preclude the Board from acting. The extent to which the Board's determination may be controlling in a subsequent claim brought by members of the Study Group is irrelevant.

^{22/} See, e.g., Quest v. Barge, 41 So. 2d 158 (Fla. 1949).

^{23/} Seavey, Embezzlement by Agent of Two Principals: Contribution?, 64 Harv. L. Rev. 431, 432 (1951). The Restatement has declined altogether to take a position on the subject, Restatement (Second) of Agency § 313 caveat (1957).

other, the loss should be thrown upon him." ^{24/} This rule is most often applied when only one of the principals is aware of the dual agency but it would seem equally appropriate here where Capitol alone knew that the payment schedule was not being met and where Capitol, on its own and without consulting with or informing the Study Group, extended to Friedman additional time in which to make the payments. It may be true that diligence on the part of the Study Group would have uncovered Friedman's delay. Assuming that the Study Group had a responsibility to inquire into the matter, the primary obligation rested with Capitol. The Study Group had no basis for concluding that it should take action; Capitol, on the other hand, failed to supervise its agent even though it knew that everything was not in order. ^{25/}

^{24/} Seavey, supra 64 Harv. L. Rev. at 433.

^{25/} Petitioner's assertion that it could not have prevented its agent's defalcation is irrelevant. (Pet. Br. 27).

II. The Board's decision finding Capitol in violation of Board regulations requiring specified documentation for trans-Atlantic charter flights and in violation of § 403(b) of the Act prohibiting charges for air transportation in excess of the carrier's currently effective tariffs is supported by substantial evidence.

In essence, the Board made two findings of violation: that in the summer of 1965 Capitol operated a trans-Atlantic charter flight without obtaining certain documentation required by the Board's regulations; and that in connection with the same flight Capitol collected excess compensation. Capitol has challenged these findings, but as shown below, both are supported by substantial evidence. Additionally, petitioner has raised miscellaneous unrelated questions with respect to the examiner's findings and these are also discussed below and shown to be without merit.

The record fully supports the examiner's conclusion that Capitol violated the Board's regulations in operating the flight without having first obtained the required documentation. In fact, petitioner does not challenge this finding but suggests that the Board, even though finding the violation, should not have imposed a cease and desist order (Pet. Br. 38, 41-42; this contention is dealt with at pp. 39ff , infra). Alternatively, Capitol has suggested that its violation was of a technical nature in that it substantially complied with the requirements and completely complied with their intended purpose (Pet. Br. 38). This argument rests on the misconception that the only function of the documentation is to assist the carrier in determining the charter-worthiness of the participants. In fact, however, the documents are to assist the Board in

enforcing the restrictions on group travel and are not solely for the carrier's benefit. (See Board Order No. ER-326, 26 Fed. Reg. 3630 (1961)). Moreover, as the examiner found, Capitol did not even substantially comply with the requirements (Tr. 653-54). Capitol's further argument that no violation can properly be found because there is no evidence that the charter group or any of its members was not properly qualified (Pet. Br. 38) is without merit on its face. It is no excuse to a violation of a law or regulation that no other harm flowed therefrom. The violation itself is harm enough. French v. Civil Aeronautics Board, 378 F.2d 468 (C.A. 10, 1967); Somlo v. Civil Aeronautics Board, 367 F.2d 791, (C.A. 7, 1966); Poulos v. New Hampshire, 345 U.S. 395 (1953).

The record also supports the finding that Friedman was the agent of Capitol for purposes of receiving payment for the charter flight. Indeed, there was a written agency agreement between Friedman and Capitol, and the fact that he was authorized to accept payments is evidenced by clause 6 of the contract (Tr. 410) specifically relating to the receipt of payment. True, Friedman breached his agreement with Capitol in accepting funds in his own name but as previously shown, Capitol acquiesced in and ratified the breach. The record also establishes that each member of the Study Group who participated in the flight paid his or her pro rata share to the Study Group and that the money in turn was transmitted either to Friedman or to Capitol. Plainly, if Friedman was Capitol's agent for collection, a tariff violation occurred when the carrier levied an additional \$92.50 on each participant as a condition

prerequisite to operating the flight for which it had contracted and as to which it had designated Friedman its agent.

Notwithstanding the foregoing, Capitol in its brief (Pet. Br. 27-35) criticizes various findings and statements in the examiner's decision on grounds that they "are not legally sufficient, are not based upon evidence of record, are contrary to the evidence or based upon pure speculation" (Pet. Br. 28). These criticisms by Capitol are not related in any coherent manner to the facts or legal principles involved in this case. We show that these objections lack merit and in nowise detract from the correctness of the decision.

Capitol's first objection consists of assertions that the evidence does not support the conclusion that the remainder of the payments due to it for the July 1 charter trip were paid to Friedman, and that the examiner's allocation of the various payments received by him for the Capitol flight rests purely on speculation and is illogical in that it attributes payments for that flight far in excess of any amounts actually due. The assertions do not aid Capitol, nor will they withstand scrutiny in light of the record. The dispositive facts relating to the payment are (1) that all participants in the flight had paid the Study Group their pro rata share of the contract price,^{26/} (2) that Mrs. Friedman testified that she turned over to Mr. Friedman all amounts collected by her other than those transmitted directly to Capitol (Tr. 72, 79), and

^{26/} See Tr. 444-52, wherein the journal entries made by Mrs. Friedman indicated payment from each of the participants in the flight.

(3) that her testimony is corroborated by the numerous checks which were drawn to Friedman by the Study Group.

The fact that Mrs. Friedman's own bookkeeping methods and the timing of the payments show amounts "allocated or allocable" to the charter flight in excess of the amount actually due cannot serve to defeat the foregoing dispositive facts; neither does the examiner's characterization of those payments for what they purported to be establish any error on his part. On the contrary, the error lay with the Friedmans and, in this context, in the manner in which Mrs. Friedman made or designated the payments to her husband. Whether the designations were erroneous or purposeful is of no moment to this proceeding, it is enough to know that she transmitted funds to Friedman in an amount at least sufficient to cover the remainder of the tariff price.^{27/} Indeed, Petitioner's argument in this respect proves too much. It concedes that at least \$20,000 was transmitted to Friedman clearly earmarked for payment on the Capitol flight. It also concedes that it received an additional \$25,000 directly from the Study Group, thus making a total of \$45,000 as to which no dispute can exist. Yet Capitol collected

^{27/} Petitioner correctly points out that there were a number of charter flights involved in the payments covered by the checks which were admitted in evidence and listed in Appendix 1 of the examiner's report. Mrs. Friedman had testified that payments received from the various participants in these flights were recorded by her, and that the monies involved were deposited to the account of the Study Group. She further testified that all of the payments received had been turned over to her husband or to the airlines involved, and her direct testimony on this point stands unimpeached. The checks themselves were offered and admitted into evidence to corroborate her testimony of payment to Friedman, rather than for the purpose of demonstrating that particular payments were to be attributed to the particular flights involved (See Tr. 79, 190).

\$16,864.80 from the passengers thereby exceeding its tariff price by some \$9533.80.^{28/} Under any view of the matter, Capitol plainly was in violation.

Capitol's second objection (Pet. Br. 30) is that the examiner erred in pointing out that Capitol could have avoided the situation by insisting that the Study Group make the payments directly to it. According to Capitol, any effort on its part to contact the Study Group would have been fruitless. The point is irrelevant, since Capitol made no such attempt nor does it show that any efforts in this respect would have been in vain. Additionally, Capitol has attempted to raise a straw man in the implication that the Board is imposing a standard of performance which will result in Capitol's being forced to cancel all flights for which it does not receive full payment well in advance of the charter date. All that the Board has suggested, however, is that Capitol fulfill the obligations for which it contracts and that, as required by the statute, it avoid any tariff violations through its agents.

The third objection (Pet. Br. 31) is that the record does not support the conclusion that Capitol looked to Friedman for payment rather than the Study Group, and that varying inferences could be drawn from Capitol's relationship with its agent, Friedman, and its conduct in attempting to

^{28/} The tariff price was \$52,331. Assuming that Capitol was charged with only those amounts received by Friedman which were admittedly earmarked for the flight, the total collected from the Study Group through Friedman or from the passengers, was \$61,864.80. In point of fact, in making its collection from the passengers, Capitol credited them with only \$10,046.20 which it concededly received from Friedman with respect to this particular flight.

collect the charter price. However, the hearing examiner after weighing all the evidence determined that in the circumstances of this case Friedman could properly be considered Capitol's agent for collection of the charter price and that due to Capitol's failure to supervise his activities and warn the Study Group, Petitioner must bear responsibility for the loss. The Board has adopted his conclusion. The view reached by the Board is supported by the evidence and even if the Court might have made a different choice had the matter been before it de novo it may not substitute its judgment for that of the Board. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951).

Capitol's fourth objection (Pet. Br. 32) is that Friedman was not its agent for collection but rather was the agent of the Study Group in relation to the payments involved, a point heretofore fully discussed. Moreover, Capitol's suggestion that it did not "select" the agent is specious; it entered into a written contract with him. Capitol had no obligation to appoint Friedman its agent or to deal with him as it did simply because he brought it the Study Group business. In addition, the evidence indicates that Capitol in fact reposed considerable confidence in Friedman since it did select him as agent for some charters which did not originate through him (Tr. 342-43). Its disavowal of Friedman came too late.

Petitioner's fifth objection carps with the examiner's statement that Friedman wronged the Study Group by failing to arrange additional charters in its behalf. The statement was characterized by petitioner as "not determinative" (Pet. Br. 32), and it is plain that it is no more

than a quibble with an immaterial statement. Indeed, we do not understand that Capitol is here championing Friedman or his conduct.

Petitioner's sixth objection (Pet. Br. 33) is that there is no support for the finding that Capitol knew that Friedman was commingling the Study Group funds with his own. Plainly, Capitol knew or should have known by reason of the method of payment from Friedman acquiesced in by it.

The seventh objection (Pet. Br. 33) is but a re-argument of Capitol's position on the "agency" question. Capitol again insists that it never authorized Friedman to collect the funds in its behalf, but as we have shown (supra, pp. 14ff), the Board correctly reached the opposite conclusion. Additionally, petitioner raises the "smoke screen" that almost everyone was confused about the number of charters to be operated by Capitol. Nonetheless, petitioner is unable to obscure the fact that with respect to the single July 1 charter flight Capitol constructively received an amount in excess of the applicable charge. It is only with regard to this flight that Capitol has been found in violation of Section 403(b).

Capitol's final objection centers around the contention that Mrs. Friedman was unaware that Capitol had authorized her husband to collect the charter price, and thus that she and the Study Group could not have relied on Capitol's acquiescence in Friedman's receipt of payments in the airline's behalf (Pet. Br. 34). The contention has elsewhere been fully answered in this brief.

It is familiar law that the role of a court in reviewing an agency's determinations is limited, and that where, as here, the findings are supported by substantial evidence, the decision should be affirmed. The standard required "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966). The Board's examiner reached his decision after a consideration of the evidence including many exhibits and two days of hearings, and his decision was not disturbed by the Board. The examiner's conclusions are supported by substantial evidence on the record as a whole (Universal Camera, supra, 340 U.S. at 490) and the Board's orders should be affirmed.

III. The imposition of a cease and desist order was a valid exercise of the Board's discretion and should not be disturbed. Moreover, the Board's order is not unlawful by reason of the scope and breadth of its terms.

Petitioner contends that no cease and desist order should have been entered against it because its violations were technical, the law was uncertain and, acting on the advice of counsel, it did as well as it could in the circumstances. It makes these arguments in face of the fact that the Board's regulations with respect to the required documentation are clear and simple (in fact, Capitol makes no argument that it did not know it was violating these requirements) and, moreover, elsewhere in its brief Capitol exposes its true objection to the cease and desist order: that Capitol wishes to remain free to violate the Board's documentation requirements with impunity whenever it deems such violations desirable from an operational standpoint (Pet. Br. 42).^{29/} Additionally, Capitol's suggestion that the law is

^{29/} Capitol's plea that its violation was not willful seems to be contrary to its present intent. Moreover, there is no requirement that willfulness be found as a prerequisite to entry of an order. Federal Aviation Act § 1002(c), 49 U.S.C. 1482(c), infra, p. 54 ; Shulman, Inc., Enforcement Proceeding, 30 C.A.B. 216, 220 (1959). Capitol's suggestion that the presence of officials of the State of New York at the time the decision was made to operate the flight somehow exonerated it from its violations misses the point (Pet. Br. 39). Indeed, it represents but one of petitioner's many attempts to shift the focus of this proceeding. It is surely true that Capitol should have operated the flight in view of its constructive receipt of the entire charter price and it could have done so without collecting \$92.50 from each enplaning passenger. "The carrier would not have faced this difficulty, however, if it had monitored the situation and insisted on payment of the tariff price in accordance with the terms of the charter agreement instead of condoning Friedman's continuing evasion until three days before the flight departure. The quandry that Capitol then faced was the product of the carrier's own failure to exercise the vigilance that is requisite in carrying on business." (Tr. 654-55).

unclear as to whether a carrier may make additional charges in the circumstances involved in the present case is contrary to the experience and understanding of the industry with respect to its duties under § 403(b): that having sold transportation a carrier must provide it and without additional charges.

Capitol's arguments would come with better grace if it were attempting to confess and avoid its error. However, Capitol is in no wise penitent nor does it recognize its violations. Rather it comes before the court insisting that it can substitute its views for those of the Board concerning proper documentation and that it did not overcharge the members of the Study Group. It boldly asserts that it is entitled to assume "the risk of committing a violation" by using means of its own choosing to verify the bona fides of its charter passengers (Pet. Br. 42) and to utilize its own collection methods. It further asserts that if it is in error a corrective order nonetheless may not be issued against it. At best, the carrier's position reduces itself to one that if the court should agree with the Board's determination, Capitol will then comply with the Board's ruling without the necessity of a formal order.^{30/} Such promises of future compliance afford no basis for overturning the Board's entry of a cease and desist order.

^{30/} Presumably, Capitol takes the position that it would have been entitled to obtain judicial review of a "finding" of violations without a corrective order notwithstanding that the court's reviewing jurisdiction is confined to "orders." § 1006(a), 49 U.S.C. 1486(a), infra, p. 55.

Giant Food Inc. v. Federal Trade Commission 116 U.S. App. D.C. 227, 322 F.2d 977, 986 (1963), petition for cert. dismissed, 376 U.S. 697 (1964); Country Tweeds, Inc. v. Federal Trade Commission, 326 F. 2d 144 (C.A. 2, 1964); Automobile Owners Safety Insurance Co. v. Federal Trade Commission, 255 F.2d 295 (C.A. 8, 1958), cert. denied, 358 U.S. 875 (1958), rehearing denied, 360 U.S. 922 (1959).

As petitioner recognizes, "the issuance of a cease and desist order rests squarely within the discretion and judgment of the Board" (Pet. Br. 36). The Supreme Court has ruled that in the matter of remedies an agency "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 613 (1946).^{31/} No serious contention has been made (nor could one be) that the order does not relate to the violations which were found. Indeed, in the circumstances of the present case and petitioner's contentions, the issuance of a cease and desist order is especially appropriate. The hearing examiner found violations of both the Act and the Regulations and fashioned an order which, if observed, will preclude repetition of the violations. See United Steelworkers of America, AFL-CIO v. National Labor Relations Board, ____ U.S. App. D.C. ____, ____ F.2d ____.

^{31/} Accord, Eastern Produce Co. v. Benson, 278 F.2d 606 (C.A. 3, 1960); G. H. Miller & Co. v. United States, 260 F.2d 286 (C.A. 7, 1958); cert. denied, 359 U.S. 907 (1959).

(Oct. 24, 1967); International Woodworkers of America, AFL-CIO v. National Labor Relations Board, _____ U.S. App. D.C. _____, 380 F.2d 628 (1967). Moreover, the order puts Capitol on notice as to its violation and represents a determination that the conduct in which Capitol was engaged is proscribed.

Capitol makes reference to other enforcement proceedings in which the Board has declined to enter orders (Pet. Br. 36), however, it offers no reason why these cases should control the resolution of this proceeding nor does it attempt to show factual similarity between those cases and this one. It is the Board which is entrusted with weighing the circumstances and deciding on the appropriate remedy for the violations which it finds, and there is no showing of abuse of discretion here, Outagamie County, Wisconsin v. Civil Aeronautics Board, 355 F.2d 900 (C.A. 7, 1966).^{32/}

Petitioner's subsidiary argument that the Board's order is too broad and should be judicially modified is not properly open for consideration by this Court. Since Capitol failed to urge its objection to the order's breadth and scope before the Board it is precluded from bringing this objection before the Court.^{33/} In any event, the objection lacks merit.

^{32/} "We agree with the Board that it need not attempt to distinguish allegedly inconsistent decisions where the facts of the present case, as here, are not substantially identical to those of the prior case cited by a petitioner." 355 F.2d at 908. Rather, the burden is on the petitioner to demonstrate both inconsistency and error.

^{33/} Section 1006(e) of the Act (49 U.S.C. 1486(e), infra, p. 55) precludes the reviewing court from considering objections not urged before the Board. Capitol filed a petition for discretionary review with
(footnote continued)

Capitol's objection to the order's scope is based entirely on the erroneous premise that the order can be read as enjoining all conduct which might be construed as a violation of either the "rates, fares, and charges" provision of § 403(b) of the Act ^{34/} or the documentation requirements of §§ 295.12 and/or 295.35 of the Board's Economic Regulations. ^{35/} Capitol's fears are unwarranted. The cease and desist order does not exist in a vacuum but must be read together with the findings and conclusions of the examiner which were adopted by the Board and which were incorporated in and made an integral part of the order (No. E-24998) disposing of the case. The examiner's decision sets forth in considerable detail and with sufficient clarity the conduct which was the subject of the proceeding and with reference to which the cease and desist order was entered.

the Board specifying therein its objections to the initial decision, but failed to raise this point; it is thus barred from raising it here. See Seaboard & Western Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 78, 183 F.2d 975 (1950); New England Air Express v. Civil Aeronautics Board, 90 U.S. App. D.C. 215, 194 F.2d 894 (1952). This principle is no less applicable to objections which go to the form or scope of an order than to objections speaking to substantive matters. National Labor Relations Board v. Cheney California Lumber Co., 327 U.S. 385 (1946); National Labor Relations Board v. District 50, United Mine Workers of America, 355 U.S. 453, 463-64 (1958); National Labor Relations Board v. Enterprise Association, 285 F.2d 642, 646-47 (C.A. 2, 1961).

^{34/} 49 U.S.C. 1373(b), infra, p. 52.

^{35/} 14 C.F.R. 295.12, 295.35, infra, pp. 57, 58.

Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360, 366 (1962); Consolidated Flower Shipment, Inc. — Bay Area v. Civil Aeronautics Board, 213 F.2d 814, 818 (C.A. 9, 1954); Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 298 F.2d 430 (C.A. 9, 1962), cert. denied, 369 U.S. 885 (1962); M & R Investment Co., Inc. ^{36/} v. Civil Aeronautics Board, 308 F.2d 49 (C.A. 9, 1962).

^{36/} The Consolidated case involved a Board order designed to prevent a cooperative shippers association from engaging in the activities of an air freight forwarder. The order was couched in broad terms requiring the association to "cease and desist from engaging indirectly in air transportation in violation of section 401(a)." The court upheld the order against the charge that it was too general or lacked specificity. "While the Board's order . . . is the equivalent of saying 'stop violating the law' yet the whole record (complaint, investigation and opinion) indicates that the cooperative knows what the Board wants it to do." 213 F.2d at 818. The Hacienda and M & R Investment Co. cases involved similar but separate schemes whereby Las Vegas hotels attempted to attract guests by offering "free" air transportation to Las Vegas on planes operated by the hotels. The Board ruled that such conduct constituted engaging in common carriage by air for compensation or hire. Since the hotels had not obtained certificates of public convenience and necessity they were in violation of § 401(a) of the Act. The orders required the various respondents to cease and desist from engaging directly or indirectly in air transportation within the meaning of the Act. In each case the order was upheld as not unduly broad, although the court indicated that it could have been drafted in more precise terms. Nonetheless, a "reading of the complaint and opinion of the Board in the present record will sufficiently apprise the petitioners of the conduct complained of, and now enjoined." 298 F.2d at 439

The Board's order in its present form imposes no undue burden
on petitioner and should be affirmed. ^{37/}

^{37/} The subject order will not be self-executing even after affirmance by this court. This decree is thus to be contrasted with one of the "penalty" or self-executing type referred to by the Supreme Court in the Broch case, supra, 368 U.S. at 364-66. When a decree of the latter type is involved special standards of clarity and precision are appropriate. Should Capitol violate the present order, the Board must apply to a district court for a restraining order or injunction prohibiting further violation (Section 1007(a) of the Act, 49 U.S.C. 1487(a), infra, p.55). In the ensuing proceeding the court will see that petitioner's rights are fully protected and an order will be entered only if the court is satisfied that a violation has in fact been committed. Capitol would only incur the risk of penalties for contempt should it violate the district court's enforcement order. F.T.C. v. Broch, supra, 368 U.S. at 366.

Moreover, the terminology of the Board's order in no way increases petitioner's risk of incurring civil or criminal penalties. Sections 901 and 902 of the Act (49 U.S.C. 1471, 1472, infra, pp. 52-3) impose such penalties not only for violations of Board orders but also for any violations of, inter alia, the very sections of the Act and the Economic Regulations concerning which the order was entered. Thus, e.g., if petitioner were to engage in activities which constituted "charging, demanding, collecting or receiving a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in . . . its tariffs" petitioner would be subject to penalties regardless of whether the activities in question were within the scope of the Board's order.

Thus, Capitol's argument that the order will require it to drastically curtail its operations (Pet. Br. 41-42) is unfounded. It will require curtailment only in the areas of documentation and overcharge where the investigation revealed curtailment to be required.

IV. The Board did not err in declining to review the Initial Decision.

Petitioner's final argument that the Board was required to review the initial decision of its hearing examiner does not in our view present a justiciable issue in the circumstances of this case. Reorganization Plan No. 3^{38/} which allows the Board to delegate adjudicatory functions to hearing examiners places discretionary authority in the Board as to whether it wishes to give effect to the initial decision or review it.^{39/} As President Kennedy explained in transmitting the Reorganization Plan to Congress:

"There is, however, reserved to the Board as a whole the right to review any such decision, report, or certification either upon its own initiative or upon the petition of a party or intervenor demonstrating to the satisfaction of the Board the desirability of having the matter reviewed at the at the top level." H.R. Doc. 152, 87th Cong., 1st Sess. 1 (1961) (Emphasis added).

The Reorganization Plan thus empowers the Board to give finality to a hearing examiner's decision and, when it does so, the decision of the hearing examiner "shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Board."^{40/} As a final order of the Board it is reviewable, but review may not be predicated

^{38/} Reorganization Plan No. 3 of 1961, 75 Stat. 837, 49 U.S.C. 1324, infra, p. 56.

^{39/} Actually, it is inaccurate to characterize the Board's action in the present case as "declining review." Rather, the Board considered the substance of the case together with petitioner's allegations of error and then determined that further argument was unnecessary because it agreed with the initial decision.

^{40/} Reorganization Plan No. 3, supra.

(except perhaps in highly unusual circumstances) on the fact that the Board did not reconsider the initial decision. Rather, if any deficiency in the Board's order is found, the order should be remanded to the Board for correction just as would be the case had the Board granted review.

We do not read to the contrary the decision in Ritz v. Civil Aeronautics Board, ___U.S. App. D.C. ___, 373 F.2d 666 (1967). There the court was confronted with a situation in which it was unable to "know just how the examiner reasoned in making his finding of a violation " (373 F.2d at 668) and in which it had difficulty "in knowing whether the examiner . . . acted with due recognition" of the Board's rules regarding the burden of proof (373 F.2d at 669). Thus the court appears to have been of the view that the error involved was one which should be corrected only by the Board. Here, the question relates only to the correctness of the order before the Court upon which the Board has placed its imprimatur by declining review. The cases are not at all similar and Capitol's contention is merely that the Board may not exercise the very power which the Act and the Reorganization Plan vest in it.^{41/}

^{41/} Capitol's suggestion that the real discretion as to review lies not with the Board but with the party seeking review is clearly erroneous. Thus, petitioner argues that the Board is somehow bound to grant review because of the standards set forth in Rule 302.28(a)(2) (14 C.F.R. 302.28(a)(2), *infra*, p. 59). The argument is without merit. Rather than prescribing the conditions on which the Board will grant review, the rule sets forth the grounds on which a petition for discretionary review may be filed. It is clear from a reading of the regulation that these qualifications for filing a petition in no way circumscribe the discretion of

Capitol has presented no further argument tending to show that the Board was required to grant review. It has cited no case,^{42/} referred to no statute, and presented no facts^{43/} in support of its position. Moreover, Capitol has made no showing that in this case the Board abused its discretion. The Board considered Capitol's petition for review, the answer filed by the Bureau of Enforcement, and the examiner's Initial Decision, and having so considered declined to

the Board. If the Rule itself were not sufficiently clear the Board's introductory comments at the time of its adoption remove any question as to its meaning.

"Section 302.28(a)(2) has been revised to make it clear that review by the Board of the initial decision is committed to its discretion. Thus, the grounds specified in that section merely prescribe the contents of petitions for discretionary review and the Board remains free to decline to exercise its right of review if it believes that review is not required in the public interest." Board Order No. PR-59, 27 Fed. Reg. 854 (1962).

^{42/} There does not appear to be a substantial body of case law dealing with the exercise vel non by an agency of its discretionary right of review of the decision of an examiner.

There are, however, numerous cases dealing with the analogous issue of whether in the absence of a statute a party to an administrative proceeding is entitled to rehearing as of right. The short answer is that no such right exists. "It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body." Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514-515 (1944). Accord, United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946).

^{43/} Capitol suggests that the Board's order imposes "liabilities" of an unusual character not warranted by commercial law on itself and other carriers (Pet. Br. 44). Such is not the case. The Board found Capitol in default with respect to its duty to comply with the Act and the Board's regulations. In effect, the order imposes no greater burden on petitioner than might result in any civil litigation.

exercise its right of review (Tr. 684). ^{44/} In such circumstances the Board's decision should be affirmed.

CONCLUSION

For the reasons stated, the Board's order should be affirmed.

Respectfully submitted,

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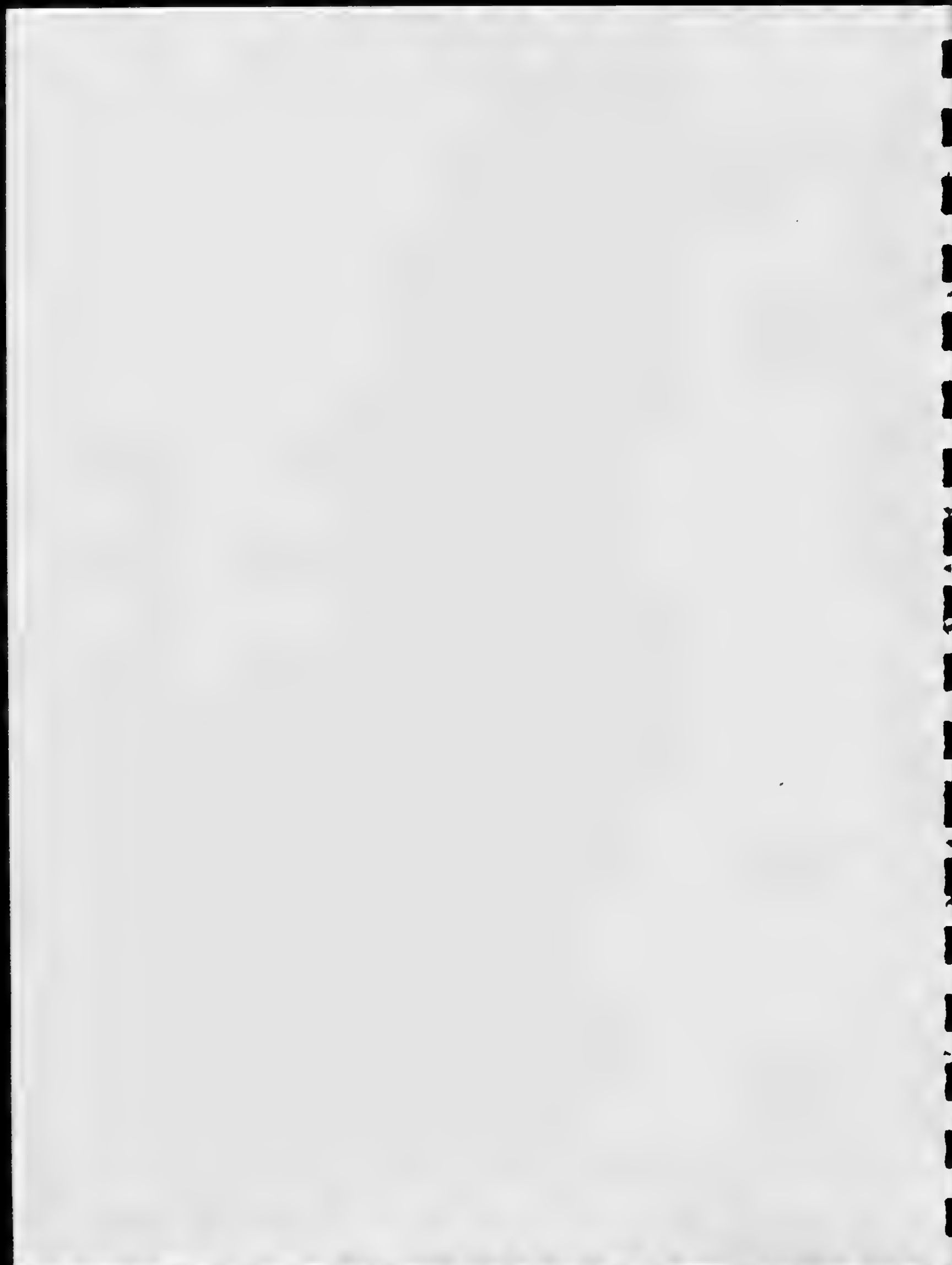
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Dated: November, 1967

^{44/} The Board's decisional process thus comports with the standards suggested by Ritz v. Civil Aeronautics Board, supra, p. 47.



APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 et seq.:

TITLE I -- GENERAL PROVISIONS

* * * * *

DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * * * *

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

* * * * *

TITLE II - CIVIL AERONAUTICS BOARD;

GENERAL POWERS OF BOARD

* * * * *

GENERAL POWERS AND DUTIES OF THE BOARD

General Powers

Sec. 204. [72 Stat. 743, 49 U.S.C. 1324] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act.

* * * * *

TITLE IV - AIR CARRIER ECONOMIC REGULATION

* * * * *

TARIFFS OF AIR CARRIERS

Filing of Tariffs Required

Sec. 403 [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373] (a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. * * *

Observance of Tariffs; Rebating Prohibited

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. * * *

* * * * *

TITLE IX - PENALTIES

CIVIL PENALTIES

Safety, Economic, and Postal Offenses

Sec. 901. [72 Stat. 783, as amended by 76 Stat. 149, 49 U.S.C. 1471] (a) (1) Any person who violates (A) any provision of title III, IV, V, VI, VII, or XII of this Act, or any rule, regulation, or order issued thereunder, or under section 1002(i), or any term, condition, or limitation of any permit or certificate issued under title IV, or (B) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not

to exceed \$1,000 for each such violation. If such violation is a continuing one, each day of such violation shall constitute a separate offense. * * *

CRIMINAL PENALTIES

General

Sec. 902 [72 Stat. 784, as amended by 75 Stat. 466, 76 Stat. 150, 76 Stat. 921, 49 U.S.C. 1472] (a) Any person who knowingly and willfully violates any provision of this Act (except titles III, V, VI, VII, and XII), or any order, rule or regulation issued by the Administrator or by the Board under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise provided in this section or in section 904, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than \$500, and for any subsequent offense to a fine of not more than \$2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

* * * * *

Failure to File Reports; Falsification of Records

(e) Any air carrier, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, fail or refuse to make a report to the Board or Administrator as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved by the Board or Administrator, or shall, knowingly and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be subject for each offense to a fine of not less than \$100 and not more than \$5,000.

* * * * *

TITLE X - PROCEDURE

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE ADMINISTRATOR AND THE BOARD

* * * * *

Investigations on Initiative of Administrator or Board

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] (b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

Entry of Orders for Compliance with Act

(c) If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

* * * * *

ORDERS, NOTICES, AND SERVICE

* * * * *

Compliance with Order Required

Sec. 1005 [72 Stat. 794, as amended by 73 Stat. 427, 49 U.S.C. 1485] (e) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

JUDICIAL ENFORCEMENT

Jurisdiction of Court

Sec. 1007. [72 Stat. 796, 49 U.S.C. 1487] (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 401(a) of this Act, any party in interest may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

* * * * *

Relevant provisions of Reorganization Plan No. 3 of 1961,
75 Stat. 837, 49 U.S.C. 1324:

CIVIL AERONAUTICS BOARD

SECTION 1. Authority to delegate - (a) In addition to its existing authority, the Civil Aeronautics Board, hereinafter referred to as the "Board", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter; Provided, however, that nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Board shall retain a discretionary right to review the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time and in such manner as the Board shall by rule prescribe, Provided, however, that the vote of a majority of the Board less one member thereof shall be sufficient to bring any such action before the Board for review.

(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Board, then the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Board.

* * * * *

Relevant provisions of the Economic Regulations of the Civil Aeronautics Board, 14 C.F.R. 200 et seq.: */

*/ Editorial Note: Revision of January 1, 1965. Slight changes in wording have been made since this revision and the requirements of 14 C.F.R. 249.10 have been incorporated in 14 C.F.R. 249.8 but the carriers' obligations remain essentially unchanged.

PART 249 - PRESERVATION OF AIR CARRIER ACCOUNTS,
RECORDS AND MEMORANDA

* * * * *

Sec. 249.10 Period of preservation of records by United States air carriers authorized to perform transatlantic charter flights.

Each United States air carrier authorized to perform charter flights for transatlantic passengers, pursuant to Part 295 of this subchapter, shall retain its records in accordance with the provisions of this section. All records of the categories set forth in this section shall be preserved for the duration of the retention periods set forth below:

* * * * *

2. Every "Statement of Supporting Information." - 2 years.

* * * * *

4. All passenger manifests including those filed by charterers - 2 years. */

* * * * *

PART 295 - TRANSATLANTIC SUPPLEMENTAL AIR TRANSPORTATION

* * * * *

Sec. 295.12 Pre-trip notification

Upon a charter flight date being reserved by the carrier or its agent, the carrier shall provide the prospective charterer with a copy of this Part 295. The charter contract shall include a provision that the charterer, and any agent thereof, shall only act with regard to the charter in a manner consistent with this Part and that the charterer shall within due time submit to the carrier such information as specified in §§ 295.34 and 295.35 and submit to each charter participant the information identified in § 295.34. The carrier shall also require that the charterer and any travel agent involved shall furnish it in due time for review before flight the information required in §§ 295.36 and 295.22, respectively.

*/ Editorial Note: The period has since been shortened to one year, 14 C.F.R. 249.8.

* * * * *

Sec. 295.22 Statement of Supporting Information.

Travel agents shall execute, and furnish to air carriers, Section A of Part II of the Statement of Supporting Information attached hereto and made a part hereof, at such time prior to flight as required by the carrier to afford it due time for review thereof.

* * * * *

Sec. 295.35 Passenger manifests.

(a) Prior to each one-way or round-trip flight a manifest shall be filed by the charterer with the air carrier showing the names and addresses of the persons to be transported and specifying the relationship of each such person to the charterer (by designating opposite his name one of the three relationship categories hereinafter described). The manifest may include "stand-by" participants (by name, address and relationship to charterer).

* * * * *

(d) Attached to such manifest must be a certification, signed by a duly authorized representative of the charterer. * * *

Sec. 295.36 Statement of Supporting information.

Charterers shall execute and furnish to air carriers Section B of Part II of the Statement of Supporting Information attached hereto and made a part hereof at such time prior to flight as required by the carrier to afford it due time for review thereof.

* * * * *

Relevant provisions of the Procedural Regulations of the Civil Aeronautics Board, 14 C.F.R. 300 et. seq. (revision of January 1, 1967):

PART 302 - RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

* * * * *

Sec. 302.28 Petitions for discretionary review of initial decisions; review proceedings.

(a) Petitions for discretionary review. (1) Review by the Board pursuant to this section is not a matter of right but of the sound discretion of the Board. Any party may file and serve a petition for discretionary review by the Board of an initial decision within 25 days after service thereof. Such petitions shall be accompanied by proof of service on all parties.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent;

(iii) A substantial and important question of law, policy or discretion is involved; or

(iv) A prejudicial procedural error has occurred. * * *

REPLY BRIEF FOR PETITIONER
CAPITOL INTERNATIONAL AIRWAYS, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,062

CAPITOL INTERNATIONAL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
United States Court of Appeals CIVIL AERONAUTICS BOARD.
for the District of Columbia Circuit

FILED DEC 28 1967

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**REPLY BRIEF FOR PETITIONER
CAPITOL INTERNATIONAL AIRWAYS, INC.**

REPLY BRIEF FOR PETITIONER
CAPITOL INTERNATIONAL AIRWAYS, INC.

I. THERE IS NO BASIS IN LAW OR FACT FOR THE FINDING
THAT PAYMENT TO FRIEDMAN WAS PAYMENT TO PETITIONER

The principal issue here is whether Petitioner violated Section 403(b) of the Federal Aviation Act of 1958, [72 Stat. 758, as amended by 74 Stat. 445; 49 USC 1373]. That section provides that no air carrier shall "charge or demand or collect or receive" greater compensation for air transportation than that stated in its current tariffs.^{1/}

The undisputed facts show that the total amount actually collected by the Petitioner air carrier in connection with the charter flight involved was that specified in its currently effective tariff. The Respondent claims, however, that Petitioner violated the statute, based upon imputed, implied or constructive receipt of a greater amount because of the conduct of Michael Friedman, husband of the Charterer's President, an independent businessman over whom Petitioner had no control, but whom Respondent would convert into a collection agent for Petitioner.

Here, it is pertinent to note that Friedman, long prior to the negotiation of the single Capitol flight, was the basic agent, planner and administrator for his wife's organization. In the process of investigating with various air carriers the availability of aircraft for the charter

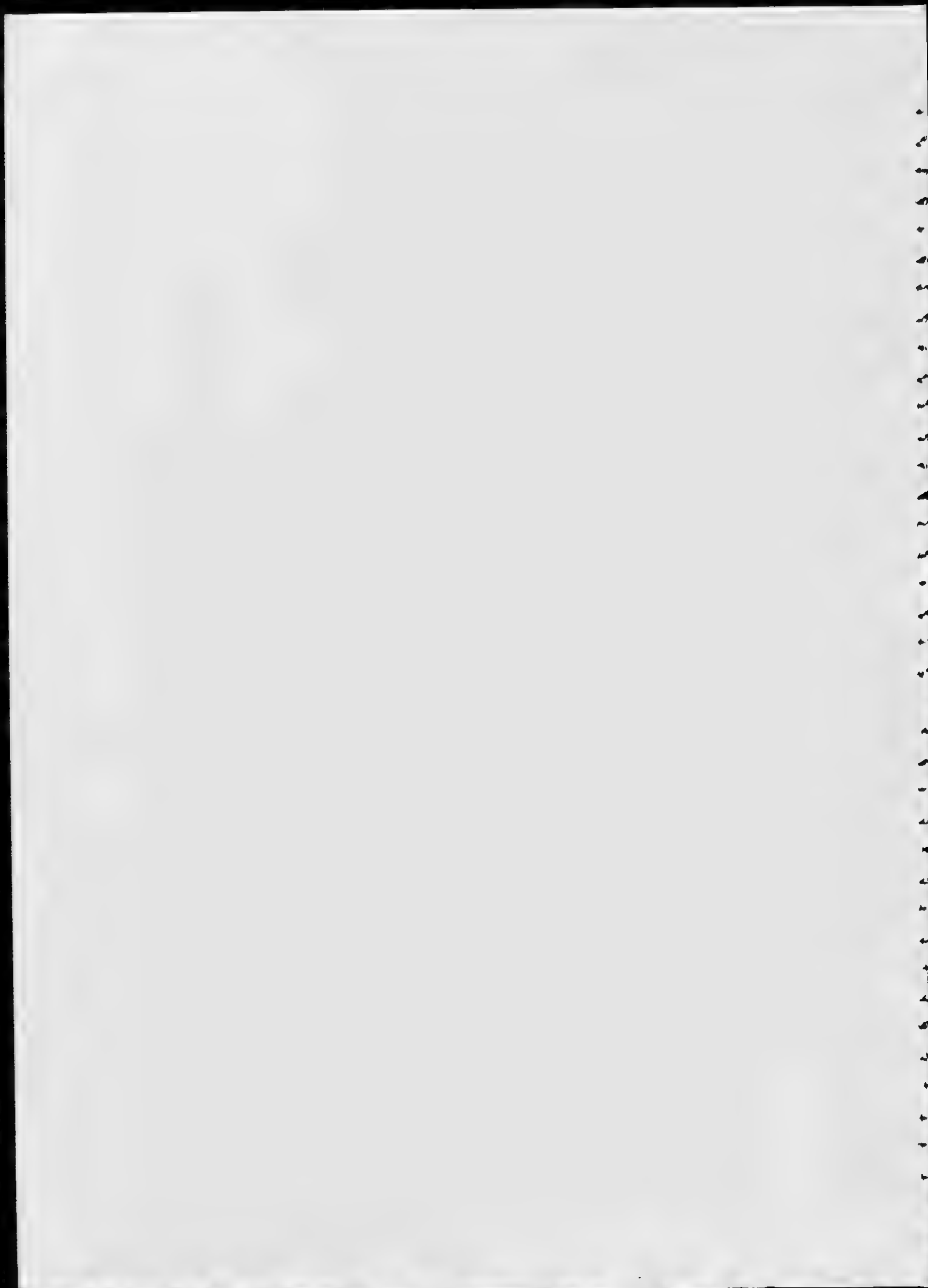
^{1/} "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein."

The Respondent's description of this provision (Res. Br. 23) imports into the first clause of this provision, with which we are here concerned, the words found only in the second clause relating to refunds and rebates, "through any agent or through any broker" which might convey specific responsibility for acts of agents or brokers.

program, Friedman did contact Petitioner and his limited agency relationship with Petitioner was not entered into until the single flight here involved was arranged.

The best direct evidence of the intended and actual relationship between the parties involved is the testimony of Mrs. Sari Friedman, representative and President of the charterer, who collected, handled and distributed the money for the charterer, and of Michael Friedman, the travel agent and husband of Mrs. Friedman. These were the principal witnesses presented by the Respondent, which had the burden of proof. The uncontradicted evidence is that Mrs. Friedman regarded her husband as her (the chartering group's) agent to disburse funds with the power and discretion to allocate funds to various airlines and to pay other expenses of the chartering Study Group (Tr. 110-111, 114, 116, 119, 120-121). Equally uncontradicted is Michael Friedman's testimony that his wife trusted him to handle the money and he agreed to do so, that he was in sole charge of what was paid out, and that when he paid a particular carrier it was impossible to tell whose money was being applied (Tr. 161, 162, 163, 166-167).

The Examiner's decision does not mention this evidence but contains findings that the charterer "trusted Friedman, as a travel agent, to arrange the charters it planned and to apply to those charters the funds remitted to him" (Tr. 649) and that "Unquestionably the charterer reposed trust in the travel agent and the latter was the agent and fiduciary of the charterer" (Tr. 651). The Examiner, whose decision was adopted by the Board, attached no significance thereto. In the first instance, the Examiner discounted this relationship by finding that the Study Group had reached no private understanding with Friedman (Tr. 649), clearly contrary to the testimony of Mr. and Mrs. Friedman (supra). In the other instance (Tr. 651), the Examiner, in effect, disregarded the fact that Friedman was the agent and fiduciary of the charterer, because he concluded, on the basis of



inferences, assumptions, and implications that Friedman was Petitioner's agent for collection, despite a clear absence of any evidence of any witnesses, including those of Respondent, that anyone so regarded Friedman or that, particularly Friedman and Mrs. Friedman so acted or believed.

The Examiner's decision below fails even to refer to the specific evidence, clear, uncontradicted and determinative as it is, as to the purpose, intent and understanding of Mrs. Friedman in turning over to her husband large sums of money for a number of charters and purposes far in excess of the price of the one charter here involved, or as to Mr. Friedman's own understanding of his role in handling the money. The Respondent's brief, including its "restatement of the case" also ignores this direct evidence of its own witnesses, upon which it must rely and by which it is bound.

Respondent states its position as follows: (Res. Br. 19-20)

"The parties have acted inconsistently with any theory other than that Friedman was in fact authorized by Capitol to receive payment from the Study Group in his own name and that Friedman was Capitol's agent for collection of the charter price. The conclusion is compelled that the limited collection agency was broadened by the conduct of the parties to embrace an authorization to Friedman by Capitol to collect from the Study Group in his own name and to transmit such receipts to Capitol by his own checks."

It is submitted, however, that any characterization of Friedman as the collection agent of Petitioner does violence to the facts of record, is based on unproven speculation, and finds no support in the law.

When the whole matter is viewed against the facts of record, it is beyond dispute that Friedman began and ended his activities as the general agent for the Study Group. The following unchallenged evidence of Mrs. Friedman makes this crystal clear. It is to be noted that the Examiner either totally ignored these matters or passed them off as of little significance.

Mrs. Friedman, the wife of Michael Friedman, was on the Flight Committee of the Study Group prior to its incorporation in November 1964 when

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When the whole matter is viewed against the facts of record, it is beyond dispute that Friedman began and ended his activities as the general agent for the Study Group. The following unchallenged evidence of Mrs. Friedman makes this crystal clear. It is to be noted that the Examiner either totally ignored these matters or passed them off as of little significance.

Mrs. Friedman, the wife of Michael Friedman, was on the Flight Committee of the Study Group prior to its incorporation in November 1964 when

the Study Group was incorporated (Tr. 49-50). She also may have served as Treasurer in 1963 (Tr. 116). Her husband arranged for the incorporation through a lawyer she never met (Tr. 105). The Study Group was located in her home (Tr. 115).

Mrs. Friedman spent most of her working time in connection with her duties as a teacher and did not have sufficient time to negotiate with airlines (Tr. 112) and used her husband Michael Friedman, since early 1964, for all the Study Group's business in locating available airlines and making other arrangements for charter trips (Tr. 107-108).

Payments from the money collected from charter participants were made by Mrs. Friedman to tour agencies directly or to airlines and to her husband for disbursement to airlines and for advertising and administrative expenses (Tr. 71-72). The payments to Friedman amounting to \$217,873.88 between November 9, 1964 and May 19, 1965 covered a whole variety of purposes including payments for secretarial services, brochures and stamps, stationery.

Mrs. Friedman testified that she funneled the money from the Study Group to her husband to make payments on behalf of the Study Group on various flights for various trips and various other purposes (Tr. 119), and that he had the power to allocate the moneys on behalf of the Study Group (Tr. 120-121). She testified that when she paid her husband, she assumed that the moneys would be paid to the proper parties (Tr. 110-111); that she relied upon him and never distrusted him (Tr. 111); that he acted as her agent in paying moneys to various airlines (Tr. 111); that when a charter agreement was submitted, it was the result of work and services of Friedman on behalf of the charterer (Tr. 114); and that in having Friedman seek out various airlines, negotiate the pricing, etc., it was done on behalf of the charterer (Tr. 116).

It is a necessary conclusion that Friedman was the general agent of the Study Group to implement its charter program before he became the limited agent of Petitioner for the one charter flight involved in this case. Yet the Examiner attributes no significance to the broad grant of authority which Friedman enjoyed with respect to all planned charters. Significantly, this evidence is not mentioned in Respondent's Brief.

The importance of the foregoing evidence lies in this: when Friedman received the money from Mrs. Friedman, he received it as the money of the Study Group and was charged with the duty of paying for all the planned charters and related activities. Of this there can be no question. Respondent's position, however, is that sometime after the receipt of the monies, Petitioner by virtue of its dealings with Friedman became the owner of the monies. In other words, some unidentifiable and unsegregated part of the monies which Friedman received as agent for the Study Group suddenly became Petitioner's funds without leaving Friedman's hands.

How this came about is impossible to discern. Respondent's explanation is utterly simplistic. Seemingly, it contends that because Friedman was Petitioner's agent for limited purposes in connection with one charter in question, any dealings which Petitioner had with him must have been in his capacity as its agent and not as the general agent of the Study Group. This is not only an unrealistic attitude to adopt in analysing the relations of the parties, but it is basically unfair, without record support and legally incorrect. One searches the Examiner's findings in vain in an effort to find any weight given to Friedman's broad powers to act for the Study Group. It is quite easy to saddle Petitioner with liability if one is willing to ignore the relationship which existed between Friedman, his wife and the Study Group. Once that relationship is given its proper weight, however,

the only reasonable conclusion is that Petitioner did not overcharge the Study Group. Respondent's Brief states (p. 15, n. 7):

"Capitol's creation of this relationship with Friedman was the single vital fact that made possible Capitol's subsequent extension of authority to Friedman and its ratification of his actions. It cannot be ignored."

As noted above, what is ignored is the general agency of Friedman on behalf of the Study Group. Friedman himself never believed that his authority to act for Petitioner had been expanded by what transpired between them. He testified that he considered the money to belong to the Study Group and that he was "solely in charge" of how the monies were distributed and paid out. (Tr. 162-163). He recognized fealty only to the Study Group, not to the Petitioner.

If Friedman's receipt of money is attributable to a grant of authority from the Study Group, he could hardly be viewed as holding the money eo instante upon receipt as a result of his alleged collection activities for Petitioner. Yet the Examiner found that Capitol was in "constructive receipt" of the monies Friedman was entrusted with by the Study Group. As elsewhere in the law the term "constructive" does not describe what actually happened in the physical order, but reflects a fictional treatment of facts to effectuate a policy (Black's Law Dictionary, 4th ed. CONSTRUCTIVE). No overriding policy operates in this case to change the facts from what the Study Group thought they were to what the Examiner constructed them to be. Mrs. Friedman's testimony in no way warrants a finding that she thought the Study Group was discharging its obligation to Petitioner by entrusting her husband with funds. On the contrary, she expected him as her agent to make actual payment (Tr. 110-111).

In view of the foregoing, the limited agency of Friedman to act for Capitol pales into insignificance. A form "agency agreement" was entered into with Friedman. (Tr. 410). This provided for a payment of a 5% commission to

Friedman, limited his authority, to "solicit and develop the charter traffic," required him to complete and transmit all documents required by the Civil Aeronautics Board and forbade him from accepting funds in Agent's name.^{2/} The clear thrust of the latter restriction was to prohibit the acceptance of funds as agent for Petitioner.

As general agent of the Study Group for various charters, however, Friedman already had the authority to receive funds in his own name as agent for the charterer. And there was nothing Petitioner could do about it. Any conduct of Petitioner subsequent to the appointment of Friedman as its limited agent had no causal connection whatsoever with creating in him the right to receive funds in his own name. And since Friedman was the only person with whom Petitioner dealt with reference to the charter, he was the only person through whom the money could be extracted. Acceptance by Petitioner, therefore, of Friedman's own checks and an extension of time to the Study Group through him cannot be used, in this context, to shift the risk of nonpayment from the charterer to the carrier. Nothing in the evidence indicates

^{2/} Respondent's stress (Res. Br. 15 and 36) on the "agency agreement" overlooks the fact that it has been a historical requirement of the Board as an express condition on the operating authority granted, that supplemental carriers, previously large irregular carriers, shall not accept any payment from or make any payment to any ticket agent except on the basis of a written bill and that each agreement between such carriers and ticket agents shall be reduced to writing and signed by all parties thereto. Sections 291.25 and 291.26 of the Board's Economic Regulations [14 CFR 291.25 and 14 CFR 291.26 quoted in the Appendix hereto. See also Section 208.31a of those Regulations (14 CFR 208.31a), as quoted in the Appendix hereto.] While Respondent (Res. Br. 2) also appears to place weight upon the operation of an agent agreement to enable the agent to solicit participants in charters, the provision cited (Res. Br., p. 2, fn. 2) became effective August 31, 1967. Prior to that date, Section 295.11 of the Board's Economic Regulations [14 CFR 295.11] read:

"A carrier shall not engage, directly or indirectly, in any solicitation of individuals (through personal contact, advertising, or otherwise) as distinguished from the solicitation of an organization for a charter trip."

There is no evidence in this record of any solicitation of individual participants by Mr. Friedman or by Petitioner, or that the agency agreement was so intended.

Petitioner's assent to such a shift of risk, or that the chartering group so believed. The only conclusion which can reasonably be drawn from the record is that Petitioner dealt with Friedman as the agent of the Study Group.

The Examiner summarizes the evidence concerning the receipt by Petitioner of payments by Friedman as follows (Tr. 635):

"To recapitulate, Capitol actually received and deposited into its own account, as distinguished from Friedman's account, only three payments:

the agency check dated January 11, 1965, for	\$ 5,281.00
the agency check dated February 8, 1965, for	5,185.20
the Study Group's certified check (received in June 1965) for	25,000.00
	<u>\$35,466.20</u>

"Mitchell's acquiescence in these deviations from the terms of the agreements is chargeable to Capitol. Mitchell was Capitol's responsible employee dealing, in the carrier's behalf, directly with Friedman. Three checks from the agent Friedman payable to Capitol (of which two were paid and the third encountered a stop order) were deposited in Capitol's bank account and the debit notice arising on the stop order was sent by the bank directly to Capitol's office at Nashville."

The fatal error in the Examiner's finding is his assumption that the acceptance of the first two checks operated as a consent by Petitioner to treat any amount received by Friedman either prior or subsequent thereto as the funds of Petitioner. There is no direct evidence to this effect and it cannot be inferred from the facts at hand. To construe the receipt of Friedman's own checks for part payment as a waiver of any claim against the Study Group for the remainder due defies logic and the record. Absent clear evidence to the contrary, the only significance to be attached to the receipt of these checks was simply that Petitioner accepted what money it could and when it could, and that it in fact dealt with Friedman as agent of the charterer. To go further and conclude that there was created an implied license in Friedman to collect on behalf of Petitioner thereafter at the risk of Petitioner is contrary to the clear course of dealings.

The same may be said of any extensions of time for payment. Since Petitioner was dealing solely with Friedman as an agent for the Study Group,

it could only grant an extension of time to it through him. Moreover, an extension of time to make payment clearly indicates that Petitioner was insisting upon actual payment and is not consistent with any theory that by accepting a few of Friedman's own checks, Petitioner was willing to treat any funds Friedman had at hand or would receive thereafter as actual payment to it. Yet the Examiner blends these two inconsistent matters to find a "constructive receipt" by Petitioner.

It follows from what has been said that there is no basis on the facts or in the law of agency, whether under the rubric of actual authority, apparent authority or ratification, to find that Petitioner had been paid prior to the time it called the charter passengers together and told them about the plight in which it found itself.

It is to be noted that the Government does not press its theory of liability to the ultimate. The Examiner found that "Friedman had received from the Study Group in the form of checks allocated or allocable to the July 1/September 3 commitment, a total of \$57,146.40." (Tr. 630) Since this was in excess of the charter price, the offense was complete upon the last payment of this total to Friedman. If he were truly the carrier's agent for collection, then, at that time, there was an overcharge on Respondent's theory. But such a conclusion would have been untenable as the Examiner must have known. What sort of a case for violation would the Government have had in such circumstances, had Petitioner cancelled the flight? Could it have been proved that Petitioner refused to provide air transportation for which it had been paid in excess of its stated tariffs? To put the question is to answer it. Common sense rebels at any such conclusion. No less untenable is a finding of liability predicated upon the collection of \$92.50 from each passenger by Petitioner who had no knowledge of what monies had been entrusted by the Study Group to the Group's general agent.

Petitioner not only had a general duty under Section 403(b) of the Act to collect the correct compensation, but a specific duty under Section 295.14(e) [14 CFR 14(e)] to require full payment of the total charter price or the posting of a satisfactory bond for full payment prior to the commencement of the air transportation.

The Respondent's argument that there is some special responsibility placed upon an air carrier by the Federal Aviation Act with respect to the collection of transportation charges, especially when an agent or broker is involved (Res. Br. 23-24) is not apposite in the instant circumstances.

Agents for charter groups in most cases, as here, represent the charterer. The so-called "agency agreement", as noted supra, grew out of past and present requirements that agreements between supplemental carriers and agents be in writing. The agreement is in essence an agreement to pay a commission or compensation in the nature of a "finder's fee." Such was the agreement here involved, which granted no continuing authority to Friedman, but was limited to the single flight out of hundreds operated by Petitioner. The charter contract placed the charterer on notice that payments were to be made to the carrier. However, it must be recognized that the travel agent here was the agent of the charterer, and the notice should have been sufficient to alert a reasonably prudent person to the fact that the agent was not authorized to collect for the carrier. The fact of the matter, as the evidence shows, is that Friedman did not hold out nor did Mrs. Friedman at any time believe that he had authority to collect on behalf of the carrier, or received funds from her in any capacity other than as her agent.

The Respondent's effort to rely on Standard Air Lines, Inc., Non-certificated Operations, 10 C.A.B. 486 (1949) is entirely misplaced. That case involved the question as to whether a carrier holding limited authority had held out to the general public that it operated regular individually ticketed services. The Board, in the face of a denial of the carrier of

responsibility for representations of its own employees, related "agency" offices, and independent ticket agencies which held and sold the carrier's tickets, found that the carrier was responsible for representations by such persons as to the carrier's schedules. The Board found that the carrier had actual knowledge of the representations.

While there is language in that case as cited by the Examiner (Tr. 650) to the effect that under regulatory statutes, a principal is generally charged with the responsibility for the acts of its agents and employees, even in situations in which there would perhaps be no liability for damages in a private law suit, it is clear from the context that the application of such liability only accrues as a matter of public policy, where, in the absence thereof, the purpose of the regulatory statute would be defeated, 10 C.A.B. 486, 494-5.

The questions here before the Court do not involve any such overriding public policy. The issue is a standard and clear-cut, although perhaps novel, question of the application of agency law. In this regard, this issue does not involve any special expertise in a field of knowledge which courts do not possess and which must be respected by the courts. It is a question of agency law which the courts are particularly well equipped to resolve.

In this regard, the transactions here involved have, as noted by Respondent, (Res. Br. 8, fn. 6) twice been the subject of court proceedings. In one proceeding, Friedman pleaded guilty and was convicted of larceny from the Study Group. In another contested civil proceeding, instituted by the Attorney General of the State of New York, Friedman, the Study Group, Mrs. Friedman and others were enjoined from engaging in charter activities in a fraudulent and illegal manner, but the portion of the suit against Capitol was dismissed with costs to Capitol, as the Examiner noted (Tr. 640),

on the ground that there was no showing that Petitioner was in any respect connected with fraud or illegal acts or practices.

While these proceedings are not determinative of the enforcement aspects of this proceeding or res judicata, two courts of the State of New York have found that the money in the possession of Friedman, was that of the Study Group and the charter participants, and not that of Petitioner herein.

II. THE RESPONDENT'S ATTEMPT TO DEMONSTRATE THAT THE EXAMINER'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE REVEALS THE CONTRARY.

Respondent, in meeting the "substantial evidence" issue, places substantial reliance and emphasis on the so-called "documentation" violation. Petitioner concedes that the documentation was not obtained due to the disappearance of the Friedmans, but contends that under the circumstances here involved, a cease and desist order was not warranted.

This is clearly a derivative and subsidiary issue, which is discussed infra, and the Respondent's effort to rely thereon merely clouds the primary issue of whether Petitioner is guilty of an overcharge.

As to the primary charge, Respondent (Res. Br. 32-38) consistently fails to make any substantial reference to the testimony of witnesses or exhibits and completely ignores the testimony of its own principal witnesses. Respondent cites repeatedly throughout its brief the conclusion that Friedman was the agent of Petitioner for purposes of receiving payment for the charter flight (Res. Br. 32), but its sole record citation for the fact is the "agency agreement" and clause 6 thereof which specifically prohibited Friedman from accepting payments for Petitioner in Agent's name.

Respondent (Res. Br. 33-34) cites record references to the effect that the participants had paid the Study Group their pro rata share of the contract price and testimony that Mrs. Friedman turned over to Mr. Friedman

"all amounts collected by her other than those transmitted directly to Capitol."^{3/}

Even if these statements were correct, Respondent concedes (Res. Br. 34, fn. 27) that the checks were offered to corroborate Mrs. Friedman's testimony of payment to Friedman, rather than for the purpose of demonstrating that particular payments were to be attributed to the particular flights involved. Thus, the evidence cited by Respondent in no way establishes the purpose of the payments to Friedman. It is not enough, as alleged by Respondent, to know that Mrs. Friedman transmitted funds to Friedman in an amount sufficient "to cover the remainder of the tariff price" (Res. Br. 34). The fact of the matter is that Mrs. Friedman paid Mr. Friedman \$217,873.88 for a whole variety of purposes, including payments for secretarial services, brochures and stamps, stationery, cards, letterheads, deposits on hotels, as well as payments to various airlines

3/ The quoted statement is not completely accurate based on the record references cited by Respondent. Mrs. Friedman testified that payments were made to tour agencies "like UNITOURS" and so forth (Tr. 71-72), that there were payments to "the airlines" (Tr. 72) as well as to Friedman. The 42 checks introduced as exhibits by Respondent in the Board hearing (Tr. 463-504) are not consecutively numbered and range from No. 583 through No. 788 and represent in the main only checks issued to the travel agency of her husband. There is no evidence except, as noted above, one check to Petitioner and one check to British Eagle (Tr. 83) as to whom the remainder of the checks were paid. Counsel for Respondent at the Board hearing, after objection by counsel for Petitioner, stated (Tr. 79):

"Now, Mrs. Friedman testified that she collected or the study group collected payments for five charters for the summertime of 1965, and that she generally made payment for the charter price to Mr. Friedman, and also that she paid the payments for charter expenses to Mr. Friedman.

"Now, presumably, well, she received all these moneys as they came in and she put them into the checking account, and presumably these were not allocated to specific accounts.

"So the only reason that I am putting these checks into evidence is to show that she paid the bulk of the moneys that she collected from passengers of these flights to her husband, Mr. Friedman.

"So it is necessary to show the entire movement of money, I think, for clarity." (Emphasis Supplied)

(Tr. 463-504, 630). This is obviously inconsistent with the Respondent's theory that Mrs. Friedman made such payments to Friedman as agent for Petitioner. It is only consistent with Mrs. Friedman's sworn testimony supra, that her husband acted as her agent (Tr. 110-111, 114, 116, 119-121).

The remainder of the Respondent's effort to refute Petitioner's contention that the Examiner's conclusions with regard to the agency issue are not based upon substantial, probative and reliable evidence (Res. Br. 35-38) must fall, because Respondent is unable to cite any record support therefor and merely resorts to argument.

The record evidence shows that Mrs. Friedman, according to her own testimony did not have time to negotiate with airlines and used her husband for all the Study Group's business (Tr. 107-108, 112). However, the Examiner used that conclusion (Tr. 651-652), contrary to the evidence, as a basis for attaching liability to Petitioner as a "manifestation of authority in Friedman to collect as Capitol's agent and in Capitol's behalf."

Respondent alleges that the Hearing Examiner "after weighing all the evidence" determined that Friedman could properly be considered Petitioner's agent for collection of the charter price and that Petitioner must bear the responsibility for loss (Res. Br. 36) without reference or citation of any direct supporting evidence. This is a classic example of the very type of administrative error which led to a Congressional mandate, recognized by the Supreme Court in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) for greater responsibility of the courts in reviewing administrative decisions. The contention of Respondent, based on that case, that the Court should not substitute its judgment for that of the Board (Res. Br. 36) begs the question in this case where there is no supporting direct evidence. For in Universal Camera Corp., supra, the Supreme Court stated, immediately following the statement paraphrased by Respondent, that:

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (340 U.S. 474, 488)

The Respondent here does not cite evidence to support the Examiner's conclusions and would apparently urge the court to ignore the evidence contrary to those conclusions. The Board cannot hypothesize that Petitioner "knew or should have known" (Res. Br. 37) without any evidence that it did in fact know and in the face of a record which demonstrates that it did not know. Nor can the Board or its Hearing Examiner hypothesize that Mrs. Friedman and through her, the Study Group, "relied on Capitol's acquiescence" (Res. Br. 37) when the testimony of Mrs. Friedman, the Respondent's own witness shows absolutely no such reliance, but rather the contrary.

III. THE RESPONDENT'S ARGUMENTS DO NOT SUPPORT THE IMPOSITION OF A CEASE AND DESIST ORDER.

The Respondent's Brief cites a novel, and quite inappropriate predicate to support the cease and desist order. It cites argument of Petitioner's counsel on brief before this Court that no such order is necessary in the public interest, as its basis for upholding need for enforcement action (Res. Br. 39).

Far more serious is the fact that Respondent appears to urge that Petitioner is at fault for not "attempting to confess and avoid its error," and because Petitioner does not "recognize its violations" (Res. Br. 40). In fact, Respondent states (Res. Br. 41):

"Indeed, in the circumstances of the present case and petitioner's contentions, the issuance of a cease and desist order is especially appropriate."

It is submitted that denial of a violation of a statute is not grounds for imposition of a sanction. If such is the basis for the Board's action, then the imposition of the order is clearly a violation of due process and contrary to the public interest.

It is submitted that denial of a violation of a statute is not grounds for imposition of a sanction. If such is the basis for the Board's action, then the imposition of the order is clearly a violation of due process and contrary to the public interest.

Indeed, Respondent's Brief is devoid of any showing that the imposition of a cease and desist order is supported by any substantial evidence or related to any public interest considerations.

Obviously, Petitioner was in a dilemma. It had not received its full tariff price. Mrs. Friedman had disappeared at the same time as her husband (Tr. 330, 361). Petitioner's telegram to the charter participants requested appearance of officers of the Study Group (Tr. 526). There is no evidence that there were any other officers of the chartering group, except Mrs. Friedman.

Petitioner consulted experienced counsel who advised that Petitioner must collect its full tariff price before operating the flight and so advised the participants (Tr. 384, 285-286, 310). Not to have operated the flight when the members of the group requested it be operated and offered to make up the deficit (Tr. 386) and in the face of known long-standing Board policy against stranding passengers, and at least silent pressure by law enforcement officials of the State (Tr. 249) would have been sheer defiance of overriding public interests. (See former Regulation Policy Statement No. 13, adopted May 14, 1962, effective May 18, 1962, Section 399.37 of the Board's Economic Regulations, 14 CFR 399.37, now incorporated as Sections 295.14(b), (c) and (d) of the Board's Economic Regulations [14 CFR 295.14(b), (c) and (d)]).

The Respondent itself concedes that at least on certain aspects of the agency question involved herein, few cases have been decided on the precise question and it has been suggested that the existing cases are of little precedential value (Res. Br. 29). Petitioner's action, on the advice of

counsel, to collect the deficit from the charter participants was an effort to comply with the requirements of its tariff and of Part 295. The record shows that Petitioner made diligent efforts to collect full payment on the charter flight (Tr. 415-421). The conclusions of the Examiner and Respondent that Petitioner should have been more diligent and insisted upon payments in accordance with the terms of its contract is sheer speculation and argument after the fact. It is not a basis for a cease and desist order.

Petitioner, acting upon the advice of counsel, exercised its best judgment to meet an unusual circumstance of a sui generis nature. There is no evidence in this record upon which Respondent can argue, either from past course of conduct or with respect to the future, that a cease and desist order is required evolving from the instant circumstances.

It is noted that the Respondent rests a considerable portion of its justification for the issuance of a cease and desist order upon the so-called "documentation violation" (Res. Br. 31-32, 39). This is essentially a derivative and subsidiary issue. While Respondent argues that Petitioner's characterization of the documentation requirements rests on a misconception (Res. Br. 31-32) the statement (Pet. Br. 38) is a direct quote from the Initial Decision of the Examiner (Tr. 622-623). In addition, it must be noted that the cases cited by Respondent in support of the proposition that the violation per se is sufficient to warrant a cease and desist order (Res. Br. 32) involve activities performed without a license.

The documentation requirements are not a matter of basic operating authority but subsidiary requirements to aid in the carrying out of the purposes of Part 295.

Petitioner does not content, as Respondent imputes, for the right to determine when it may commit a violation. The contentions of Petitioner and the counter response of the Respondent must be evaluated in the context of the circumstances. On the eve of the flight, the President and the agent of

the charterer had disappeared. Petitioner could not obtain the documentation as a practical matter, since the actual documentation required could only be provided by the agent and/or the President of the chartering organization. Petitioner did the best it could in the circumstances by obtaining a list of the passengers, and, based upon its knowledge of the charterworthiness of the group, elected to operate the flight rather than cancel and disappoint over 150 passengers.

In view of the fact that this involves a single instance, not a series of recurring omissions, and in the absence of any indication in this record of any disposition by Petitioner to avoid the documentation requirements in the future, it must be concluded that the cease and desist order with respect to the documentation count is completely unjustified. There is no warrant for the Respondent, as an alternative to a more realistic basis for supporting the cease and desist order, to argue that same is required to insure compliance by Petitioner because of the fact alone of the argument presented in the Brief of Petitioner's counsel, in this Court or because of the fact of Petitioner's prosecution of its defense to the enforcement action.

Petitioner on brief in this Court argued, based upon past history of Board policy on screening charters and against stranding passengers, that no public interest would be served by the issuance of a cease and desist order under the circumstances here involved. The construction placed by Respondent (Res. Br. 39-41) is entirely unwarranted. As pointed out above, the carrier was faced by the dilemma of canceling the flight and stranding passengers because of lack of documents due to circumstances beyond its control, or taking action at its own risk should later review disclose that there was some defect in the charterworthiness of the group. The instant position of Respondent that the Petitioner should have canceled the flight and stranded the passengers is clearly contrary to past Board policy and contrary to the public interest as set forth in Petitioner's Brief (Pet. Br. 36-42).

The argument of Respondent that the issue as to scope and undue breadth of the order is not open for consideration by this Court is clearly without merit. Under the Board's rules for filing petitions for discretionary review (Pet. Br. 43), the grounds therefor are substantially limited. Persons seeking such review are not authorized to raise every objection to an Initial Decision. Petitioner, however, did in fact clearly raise the issue of whether any cease and desist order should be issued against it in this proceeding, and that the grounds alleged by the Examiner was not an appropriate basis for the sanction (Tr. 672-673). This clearly raised the issue as to whether the cease and desist order recommended by the Examiner should be modified.

The Respondent has not adverted to any finding by the Examiner that there was likelihood of recurrence of the violations. The cases cited by the Respondent (Res. Br. 41) relate to continuing practices and are inapposite here. All the cases involve continuing practices which were discontinued only during investigation. It is noted, however, that in Country Tweed, Inc. v. Federal Trade Commission, 326 F.2d 144 (CA-2, 1964), the court condemned sweeping language in a cease and desist order and found that cessation of the offending activity, with the likelihood that the petitioner will not again resume it or a related activity, has been one factor which courts have considered in limiting broad agency orders. The offending broad language was stricken from the order. As pointed out in Petitioner's Brief (Pet. Br. 37-38) there must be some relation between the facts found and the breadth of the order. The discretion to be applied by the Board must be a reasoned discretion, based upon all the facts and circumstances. The cases cited by the Respondent confirm that the order must have a reasonable relationship to the unlawful practices found to exist.

In Shulman, Inc., Enforcement Proceeding, 30 C.A.B. 216 (1959), which involved numerous and widespread violations, the Board specifically found

that the Federal Aviation Act does not make it mandatory upon the Board to issue cease and desist orders whenever it finds that violations of the Act have occurred. The Board clearly stated its opinion that the issuance of a cease and desist order depends upon public interest considerations in the light of the facts and circumstances of the individual case (30 C.A.B. 216, 220). Clearly neither the Examiner nor the Respondent in its Brief have pointed to any public interest considerations, which warrants the issuance of a cease and desist order under the circumstances here involved.

IV. THE BOARD ERRED IN DECLINING TO REVIEW
THE INITIAL DECISION.

Respondent argues that the Board did not in fact decline to review the Examiner's decision in this case, but considered the substance of the case together with "Petitioner's allegations of error" and determined that further argument was unnecessary because it agreed with the initial decision (Pet. Br. 46, fn. 39, 48). The Respondent's Brief further takes the position that the standards set forth in Rule 302.28(a)(2) [14 CFR 302.28(a)(2)] are binding only on the person seeking discretionary review and are not binding on the Board. In other words, the Respondent argues that the regulation in question is not binding upon the Board, contrary to the long-standing proposition that administrative agencies are bound by their own rules. As pointed out in Petitioner's Brief (Pet. Br. 43), the authority from which this procedure is derived, Reorganization Plan No. 3 of 1961, 75 Stat. 837, 49 USC 1324, requires the Board to prescribe rules for such review and such provision is binding upon the Board as well as the party seeking such review.

The petition for discretionary review specifically pointed out to the Board that the initial decision omitted reference to the most crucial and determinative facts adduced by the principal witnesses by the Bureau of Enforcement, as to the intent of Mr. and Mrs. Friedman in their dealings.

It also pointed out that the instant proceeding was a matter of first impression before the Board involving far-reaching implications as to administration of charter contracts with possible far-reaching impact upon all air carriers engaged in commercial operations as well as imposition upon air carriers not imposed by ordinary commercial law and not contained in any regulation, rule or requirement of the Board (Tr. 666-674). In addition, as noted above, Petitioner pointed out that the imposition of the sanction of a cease and desist order under the circumstances here involved related to Board policy and discretion which in this instance should be exercised by the Board itself.

The Respondent's attempt to equate the right to review to reconsideration (Res. Br. 47) or rehearing (Res. Br. 48, fn. 42) is not meaningful. Having met the standards for review, which are binding upon the Board, the Petitioner was entitled as a matter of right to have the opportunity beyond the limited form of a petition for review, to meet the issues in the case, and to document the errors committed by the Examiner, with right to written and oral argument before the Board. If, in fact, as Respondent alleges, the Board actually considered and decided this proceeding, based solely on the limited scope afforded by Petitioner's petition for discretionary review, as alleged by Respondent (Res. Br. 46, fn. 39), instead of on the whole record, Petitioner was deprived of substantial rights including the exercise of discretion by the Board.

However, the Board having declined to review this proceeding and since the matters of agency law, substantial evidence and burden of proof, do not involve agency expertise, such matters having been fully litigated in this Court should be resolved by this Court. Thus, Respondent's request that the order should be remanded to the Board for correction if found deficient should be so remanded only with appropriate guidance and excision

of those parts of the order found by this Court not to be sustained as a matter of burden of proof, substantial evidence or in accordance with the law.

Respectfully submitted,

/s/ Theodore I. Seamon

Theodore I. Seamon

Attorney for
Petitioner

December 28, 1967

APPENDIX A

Relevant excerpts from the Civil Aeronautics Board Regulations:

PART 208 -- TERMS, CONDITIONS AND LIMITATIONS OF CERTIFICATES
TO ENGAGE IN SUPPLEMENTAL AIR TRANSPORTATION

Subpart A -- General Provisions

* * * * *

Section 208.31a (14 C.F.R. 208.31a) -- Written agreements with ticket agents.

Each agreement between a supplemental air carrier and any ticket or cargo agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects:

- (a) The furnishing of persons or property for transportation;
- (b) The arranging for flights for the accommodation of persons or property;
- (c) The solicitation or generation of passenger or cargo traffic to be transported;
- (d) The charter or lease of aircraft.

* * * * *

PART 291 -- CLASSIFICATION AND CONTINUED EXEMPTION OF LARGE
IRREGULAR AIR CARRIERS

* * * * *

Section 291.25 (14 C.F.R. 291.25) -- Large irregular carriers; conditions on operating authority; payments to or from ticket agents.

As an express condition on the operating authority granted by this Part and the letters of registration issued hereunder, no large irregular air carrier shall accept payment from or make payment to any ticket agent furnishing passengers or groups of passengers for transportation by air except on the basis of a written bill, invoice, or other written statement showing:

- (a) The information specified in §291.24 contained in tickets sold to passengers furnished by such ticket agent;

(b) The amount of commission or other consideration paid to, or retained by, such ticket agent in return for services rendered in connection with the furnishing of transportation, including payment, allowance, or reimbursement for cash advances for crew expenses, flight expenses, communication services, advertising or any other service. [Former § 291.25 redesignated as § 291.32, and present § 291.25 added by Amendment No. 2, effective December 10, 1949, 14 F.R. 6807.]

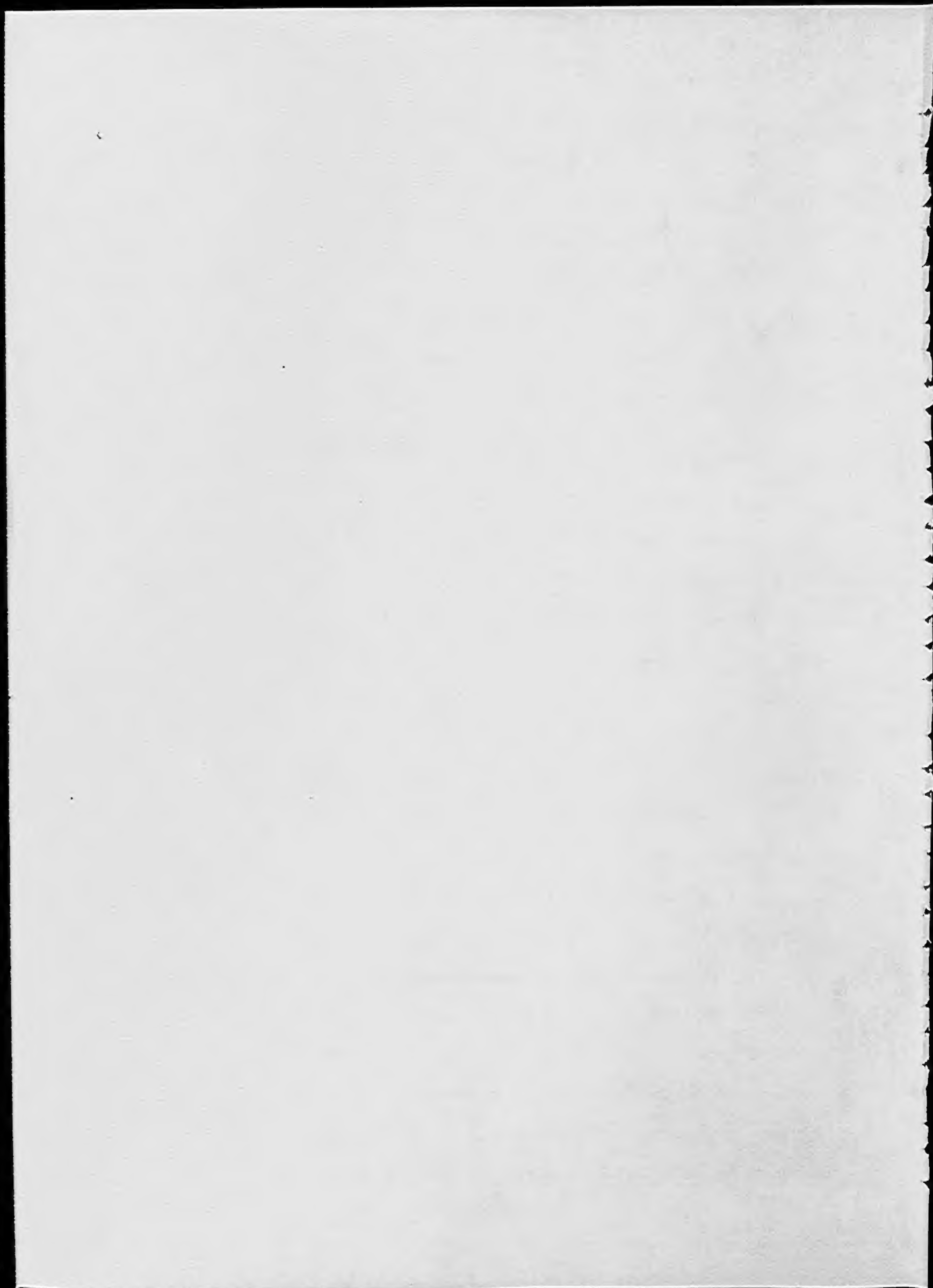
Section 291.26 (14 C.F.R. 291.26) -- Large irregular air carriers; conditions on operating authority -- Agreements with ticket agents.

As express conditions on the operating authority granted by this Part and the letters of registration issued hereunder:

(a) Each agreement between a large irregular carrier and any ticket agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects:

- (1) The furnishing of persons or groups of persons for transportation,
- (2) The arranging for flights for the accommodation of passengers or groups of passengers,
- (3) The solicitation or generation of passenger traffic to be transported by a large irregular carrier, or
- (4) The charter or lease of aircraft.

(b) No large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction, or collaboration with another air carrier or carriers, where



the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier, take it out of the classification of an irregular air carrier as set forth in this part. [Former § 291.26 redesignated as § 291.33, and present § 291.26 added by Amendment No. 2, effective December 10, 1949, 14 F.R. 6807]